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No. 82-

In the Supreme Court of the United States

OCTOBER TERM, 1982

CONSOLIDATED SERVICE CORPORATION,
WATTS DETECTIVE AGENCY and
CHRISTOPHER P. RECKLITIS,
PETITIONERS,

v.

ROBERT ROBINSON, TRUSTEE IN BANKRUPTCY
OF D.C. SULLIVAN & CO., INC.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I

Questions Presented For Review

1. Under Fed. R. Evid. 609(a), is evidence of a party/witness's prior criminal conviction admissible for impeachment purposes on direct examination by the opposing party even though Rule 609(a) limits such evidence to cross examination only?

2. Did former Rule 43(b) of the Federal Rules of Civil Procedure, abrogated effective July 1, 1975, govern the admissibility of evidence at a trial held in March 1980?

3. Is it a transfer of property within the meaning of the fraudulent transfer provisions of section 67d(2)(a) of the Bankruptcy Act to hire an officer and the at-will employees of a defunct business, and to commence servicing most of the business' former customers?

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v.

ROBERT ROBINSON, TRUSTEE IN BANKRUPTCY
OF D.C. SULLIVAN & CO., INC.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioners Consolidated Service Corporation, Watts Detective Agency and Christopher P. Recklitis[1] respectfully pray that a writ of certiorari issue to review the judgment of the United Stated Court of Appeals for the First Circuit entered in this proceeding on July 19, 1982.

[1] In addition to the parties listed in the caption hereof, the parties to the proceeding below included Daniel C. Sullivan and Billy R. Otte.

Opinion Below

The opinion of the United States Court of Appeals for the First Circuit is reported at 685 F.2d 729 (1st Cir. 1982), and is duplicated at Appendix pages A-1 through A-25.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was rendered and entered on July 19, 1982. Petitions for rehearing were filed by petitioner Christopher P. Recklitis on July 30, 1982, by Daniel C. Sullivan on August 2, 1982, by Robert Robinson, Trustee, on August 2, 1982, and by Billy R. Otte on August 6, 1982. All petitions for rehearing were denied by Orders entered on September 14, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Statutes And Rules Of Court

BANKRUPTCY ACT, section 67d(2)(a), former 11 U.S.C. section 107d(2)(a) (1970):

> Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent....

FED. R. EVID. 609(a):

> *General rule.* For the purpose of attacking the credibility of a witness, evidence that he has been con-

victed of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Statement of the Case

1. *Statement of Facts*

In the late 1960's D.C. Sullivan & Co., Inc. ("the Bankrupt"), a security guard business, experienced rapid financial deterioration. Its customers decreased from 35 to 17 (A-71) and its disbursements exceeded receipts by nearly 50%. (A-71, 72).

By April 1970, the Bankrupt was deeply in debt to the IRS and others (A-3, A-73), and was unable to pay its debts as they became due (A-75).

In early 1970, Billy R. Otte ("Otte"), Vice President of the Bankrupt, discussed a possible sale of the Bankrupt with Christopher P. Recklitis ("Recklitis"), the president of Watts Detective Agency ("Watts") and Consolidated Service Corporation ("Consolidated")[2] (A-4). Recklitis made a number of proposals on behalf of Watts to buy the bankrupt as a going concern, subject to IRS approval (A-4, A-5). The highest offer was approximately $200,000 payable over several years and contingent on maintaining sales levels (*id.*).

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[2] Watts Detective Agency and Consolidated Service Corporation were subsequently directly or indirectly merged into SCA Disposal Services of New England, Inc., a wholly-owned subsidiary of SCA Services, Inc., a public corporation. SCA Services, Inc. has approximately 66 subsidiaries, all but four of which are wholly owned.

The IRS rejected each of Watts' proposals. The last meeting with the IRS ended at 5:00 p.m. on April 22, 1970 (A-5). At that time the IRS stated that it would levy on the Bankrupt's accounts receivable the next morning (*id.*), and it in fact did. (A-75).

The Bankrupt's accounts receivable were its only source of cash and it was admitted that as of 5:00 p.m. on April 22, 1970, no cash was or would be available to cover either payroll checks already issued or the weekly payroll for that week (A-75). In the words of its president, "the ship was going down."

Thereafter, Recklitis, on behalf of Watts, offered Otte a job and Otte accepted (A-5). As a Watts employee, Otte thereafter began approaching the Bankrupt's former customers to offer them Watts' services (*id.*). Watts also hired most of the Bankrupt's former guards.

Watts already knew the customers' identities (A-76). The only contract the Bankrupt had with any of its customers was terminable on 24 hours notice and neither Otte nor the guards had employment contracts. Watts ultimately serviced 13 of the 17 former customers. (A-5).

Watts did not receive any funds due to the Bankrupt, (A-77) nor did it use the Bankrupt's trade name.

On May 22, 1970, an involuntary bankruptcy petition was filed against the Bankrupt and it was adjudicated (A-77).

2. *Proceedings Below*

On October 6, 1970 the Trustee in Bankruptcy of the Bankrupt filed the Complaint herein in the United States District Court for the District of Massachusetts. He claimed, *inter alia*, that hiring the Bankrupt's former employees and servicing most of its former customers amounted to a fraudulent transfer of the Bankrupt's assets without consideration within one year of bankruptcy, under section 67d(2)(a) of

the Bankruptcy Act, former 11 U.S.C. § 107d(2)(a) (1970). Jurisdiction existed under section 67e of Bankruptcy Act, former 11 U.S.C. § 107e (1970).

In March 1980 the action was tried to a jury. In the intervening 9 years Recklitis' circumstances had changed: at the time of trial he had recently been convicted, and was incarcerated, on unrelated charges of mail fraud. The Trustee compelled his presence as a witness by writ of habeas corpus.[3] On his direct examination, over objection, the Trustee introduced evidence of Recklitis' criminal conviction for fraud, ostensibly for impeachment purposes. The Trustee vigorously exploited that evidence later in his summation.

The jury returned a verdict for the Trustee in the amount of $750,000 against all petitioners.

Watts, Consolidated and Recklitis then moved for judgment notwithstanding the verdict or for a new trial.[4] (A-29). Those motions were denied on August 28, 1981, (A-26) and Watts, Consolidated and Recklitis filed a notice of appeal from that judgment on September 25, 1981. The Trustee cross-appealed.

On July 19, 1982, the First Circuit affirmed the judgment against Watts, Consolidated and Recklitis in its entirety. It held that "the guards, customers and goodwill" were "property in a bankruptcy setting" and that in the aggregate they amounted to "the business itself," that "[t]he whole was greater than its parts." (A-8) It therefore concluded that by hiring Otte and the guards and servicing the customers Watts received property belonging to the bankrupt.

Recklitis, the Trustee and two co-defendants filed timely petitions for rehearing, which were denied on September 14, 1982 (A-62 - A-68).

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[3] None of the defendants, including Recklitis himself, sought such a writ.

[4] Defendants' motions for a directed verdict had been denied subject to later motions for judgment notwithstanding the verdict.

Reasons For Granting The Writ

I. The Decision Of The Court Of Appeals For The First Circuit Directly Overrules A Congressional Restriction On The Federal Courts.

The decision of the Court of Appeals for the First Circuit overrides a restriction on the use of prior conviction evidence which was deliberately imposed on the federal courts by Congress. Rule 609(a) of the Federal Rules of Evidence, as amended and approved by Congress, reads:

> *General rule.* For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record *during cross-examination* but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment. [emphasis added].

As part of his case-in-chief, the Trustee called Recklitis and introduced on direct examination, over objection, evidence of Recklitis' recent unrelated conviction. (A-18). The District Court and the First Circuit refused to follow the language of Rule 609(a) which specifically limits such evidence to cross examination.

Restricting introduction of such evidence to cross examination only was expressly required by Congress. The Supreme Court's original draft of Rule 609(a) had no such restriction:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law which he was convicted or (2) involved dishonesty or false statement regardless of the punishment.

Notes of the Committee on the Judiciary, House Rep. No. 93-650, quoted at 28 U.S.C.A. Fed. R. of Evid., Rule 609, at 284. The language limiting such evidence to cross examination was inserted by the Senate Committee on the Judiciary, Senate Report No. 93-1277, 28 U.S.C.A. Fed. R. Evid., R. 609, at 286.

Both the Senate and House Committees on the Judiciary were particularly concerned with the danger of unfair prejudice which this type of impeachment evidence by its nature entails. *Id.* Limiting such evidence to cross-examination was intended to limit the rule to witnesses who voluntarily take the stand and thus place their credibility in issue. That restriction is necessary, in a civil case, to prevent a party from calling an opposing party primarily to bring the highly prejudicial evidence of an unrelated conviction before the jury.

The First Circuit's decision eviscerates that congressionally-imposed restriction. The court reasoned that Federal Rule of Civil Procedure 43(b) (abrogated effective July 1, 1975) governs this case, and that it allows a party to call an adverse party as a witness and to "contradict and impeach him in all respects as if he had been called by the adverse party" (A-19). Then, citing Federal Rule of Evidence 607, which permits a party calling a witness to attack his credibility, it concluded that in a civil case a party may call an adverse party as a witness and then impeach him through evidence of a prior criminal conviction. (A-19). The First Circuit did not even discuss the clearly restrictive language of Rule 609(a).

The First Circuit's reliance on Fed. R. Evid. 607 is misplaced. Rule 607 is a general rule as to who may impeach, not as to what evidence is admissible to impeach. The rule reads, in its entirety, "The credibility of a witness may be attacked by any party, including the party calling him." The succeeding rules, Rules 608, 609 and 610, on the other hand, are detailed rules specifying the exact circumstances in which particular types of impeachment evidence may or may not be introduced. Merely because Rule 607 generally permitted the Trustee to impeach Recklitis does not mean that the district court could ignore the specific rule dealing with the particular method of impeachment used. If Rule 609 (as well as Rules 608 and 610) does not limit the manner in which a party may impeach "any witness," then it is meaningless, and none of its restrictions apply. Rule 607 should not be read to render the succeeding rules nullities.

The only other Circuit Court of Appeals which has addressed the question, the Ninth Circuit in *United States* v. *Dixon*, 547 F.2d 1079, 1082 n.2 (9th Cir. 1976), bypassed the congressional restriction on a different theory. It reasoned that all Congress intended was to prevent a witness who did not testify from being impeached by prior conviction evidence. The court relied on a single sentence of the legislative history, taken out of context, indicating that Congress understood that impeachment evidence is not admissible if a person does not testify.[5] However, even if the term "witness" in the rules could be

[5] That legislative history, in context, reads:

> One other clarifying amendment has been added to this subsection, that is, to provide that the admissiblity of evidence of a prior conviction is permitted only upon cross examination of a witness. It is not admissible if a person does not testify. It is to be understood, however, that a court record of a prior conviction is admissible to prove that conviction if the witness has forgotten or denies its existence.

Notes of Committee on the Judiciary, Senate Rep. No. 93-1277, quoted at 28 U.S.C.A. Fed. R. Evid., R. 609, at 286.

taken to include a nonwitness at trial — a dubious proposition at best — congressional choice of the phrase "cross examination" must have meant something less than *all* types of examination.

The decision of the First Circuit thus renders the Congressional act of inserting the phrase "during cross examination" into Rule 609(a) a meaningless exercise.

II. The First Circuit Erred Fundamentally In Holding That Former Rule 43(b) Of The Federal Rules Of Civil Procedure, Abrogated In 1975, Governed The Admissibility Of Evidence At Trial.

In affirming the District Court's decision to allow testimony as to Recklitis' criminal conviction into evidence, the First Circuit held:

> "Federal Rule of Civil Procedure 43(b) governs the mode of inquiry of this type of witness . . . ."

(A-19).

Former Rule 43(b) was abrogated nearly 5 years before the trial. The Order of the Supreme Court dated November 20, 1972, approved by Congress, Pub. L. 93-595, § 3, 88 Stat. 1926 (January 2, 1975), effective July 1, 1975, both adopted the Federal Rules of Evidence and abrogated former Fed. R. Civ. P. 43(b).

The District Court below did not rely on the abrogated rule, the Trustee did not urge its applicability on appeal, and the First Circuit did not explain why it should be applicable. Indeed, the First Circuit's reliance on both Fed. R. Civ. P. 43(b), which the Federal Rules of Evidence replaced, and various Federal Rules of Evidence is inherently inconsis-

tent. At the time of Trial Rule 43(b) had been abrogated for almost 5 years, and the Rules of Evidence had been in effect for that same period as its replacement.

The First Circuit's reliance on the long abrogated rule was such a clear and fundamental error that in itself it calls for correction.

III. The Decision Of The Court Of Appeals For The First Circuit Creates A Conflict In The Circuits.

The First Circuit's holding that hiring employees and servicing customers constituted a transfer of property conflicts with the holding of the Court of Appeals for the Fifth Circuit in *Trask* v. *Susskind*, 376 F.2d 17 (5th Cir. 1967), and is inconsistent with other applicable authority.

In *Trask* v. *Susskind*, the trustee claimed that a creditor caused the bankrupts to go out of business and then conspired with employees of the bankrupts "to transfer the goodwill and business customers of the bankrupts" to the creditor's corporation. *Id.* at 19.

In *Trask* the day after the bankrupts ceased doing business former employees of the bankrupts started soliciting former customers on behalf of their new employer, and approximately 50% of the bankrupts' former customers started doing business with the new company, in what the court acknowledged was a "very smooth" transition. 376 F.2d at 20. The District Court held that this was not sufficient to constitute a fraudulent transfer and the Fifth Circuit affirmed, holding that the trustee had not established "that the bankrupts had suffered any damage as a result of these activities." *Id.* at 20. The employees were not property of the bankrupts, the new corporation already knew the bankrupts' customers, and there was no transfer of goodwill, because "[o]rdinarily, goodwill cannot be transferred separate and apart from tangible assets . . . ." *Id.*

It thus came to a conclusion directly opposite to that reached by the First Circuit herein.

The First Circuit sought to avoid a direct conflict with *Trask* by asserting that in *Trask* the bankrupts had ceased operations while in this case the jury might have found that the Bankrupt's business was still being conducted as of the time of the alleged transfer (A-9), and that therefore the hiring of the former employees and solicitation of the former customers was "a transfer ... of the operating portion of the [Bankrupt's] business ...." (A-10).

That purported distinction, on the basis of the passage of one night,[6] is without substance. A debtor should not be regarded as a going concern "if at the time ... he was financially dead or mortally wounded." *In re Fred D. Jones Co.*, 268 Fed. 818, 819 (7th Cir. 1920), *appeal dismissed sub nom. Heldman* v. *Central Trust Company of Illinois*, 257 U.S. 664 (1921). A company which is not in fact an ongoing business cannot be viewed as having value as an ongoing business. *E.g.*, *Langham, Langston & Burnett* v. *Blanchard*, 246 F.2d 529, 532 (5th Cir. 1957); *In re Fred D. Jones, Co.*, *supra* 268 Fed. at 819; *In re Windor Industries, Inc.*, 459 F. Supp. 270, 276 (N.D. Tex. 1978).

The Bankrupt could not retain Otte as an employee and it could "retain" its other employees only by defrauding them and violating a criminal statute. *See* Mass. Gen. Laws Ch. 149, § 148 (1971). A company which cannot operate except by committing fraud and criminal conduct is not an ongoing business.

The decision of the Fifth Circuit in *Trask* v. *Susskind* represents a recognition of the reality of a business's demise. If

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[6] Otte was hired after 5:00 P.M. on April 22, 1970, when the Bankrupt knew "the ship was sinking", while the *Trask* employees were hired the day after the *Trask* bankrupts had ceased operations.

a business cannot pay its employees and service its customers, someone who hires those employees and solicits those customers does not thereby obtain "property" belonging to the defunct company. The First Circuit's holding to the contrary should be reversed.

IV. The Decision Below Will Make Officers And Employees Of Failing Businesses Unemployable.

The Petitioners have been subjected to substantial liability because they did not wait until the Bankrupt's employees had suffered the effects of unemployment fully before hiring them.

In this case, as in *Trask* v. *Susskind*, *supra*, a central consideration is the right of an employee of a bankrupt to work for another employer. A bankrupt should not be in a position to compel its at will employees to work for nothing, to refuse to work, or, without a covenant not to compete, to refuse to solicit former customers on behalf of a new employer. Nor should a new employer be punished for offering jobless employees jobs, or forced to wait an arbitrary period while its prospective employees swell the ranks of the unemployed. The Fifth Circuit in *Trask* firmly held that a former employee of a bankrupt is entitled to work for a new employer in the same business. The Courts of the Commonwealth of Massachusetts would have applied the same rule to the Bankrupt's employees. *See J.T. Healy & Son, Inc.* v. *James A. Murphy & Son, Inc.*, 357 Mass. 728, 740 (1970); *DiAngeles* v. *Scauzillo*, 287 Mass. 291, 295-96 (1934); *Padover* v. *Axelson*, 268 Mass. 148, 151-52 (1929).

The First Circuit, however, has now held that one who hires the employee of a failing company either cannot do so or can do so only at the risk and expense of defending an action such as this one. That holding will deny former employees of a bankrupt the ability to earn a living for a substantial period after their employer stops paying them.

A central purpose of the Bankruptcy Act and Code is to give debtors a fresh start. It should not be subverted into a means for giving a debtor's employees the cruel choice of either working for nothing or not working.

V. The Decision Of The Court Of Appeals For The First Circuit Is Contrary To The Language And Intent Of The Bankruptcy Act And Code.

Section 67(d)(2)(a) of the Bankruptcy Act, on which the Trustee's claim was based, makes voidable any transfer of property by a bankrupt within one year of bankruptcy, made without fair consideration and either made while the bankrupt was insolvent or which renders the bankrupt insolvent. The Bankruptcy Code contains a similar provision. 11 U.S.C. § 548 (1979).

The Trustee alleged that the Bankrupt transferred its employees, customers and goodwill to Watts on or after April 23, 1970. None of these items constituted property under the Bankruptcy Act because the Bankrupt did not have rights in these items recognizable under Section 67(d).

A fundamental element of "property" is the right to exclude others from its use. *Kaiser-Aetna* v. *United States*, 444 U.S. 164, 179-80 (1979). Even when something claimed to be "property" has been acquired or developed at substantial expense, it is not property unless the purported owner has a legal right to exclude others from using it. *International News Service* v. *Associated Press*, 248 U.S. 215, 250 (1919) (dissenting opinion by Brandeis, J., cited with approval by this Court in *Kaiser-Aetna* v. *United States*, *supra*, 444 U.S. at 180 n.11):

> An essential element of individual property is the legal right to exclude others from enjoying it .... [T]he fact

> that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property.

U.S. at 250.

The purpose of the fraudulent transfer statute is to prevent "a bankrupt [from] depleting his estate just preceding his bankruptcy." *Mayo* v. *Pioneer Bank & Trust Co.*, 270 F.2d 823, 830 (5th Cir. 1959), *cert. denied*, 362 U.S. 962 (1960); *accord*, 4 *Collier on Bankruptcy*, ¶67.30 at 489 (14th ed. 1978). Detriment to the bankrupt's estate is the concern of Section 67(d). That a third party may be benefited by the bankrupt's ceasing to do business thus does not prove a fraudulent transfer. *In re Commodity Merchants, Inc.*, 538 F.2d 1260 (5th Cir. 1976). *See In re Portland Newspaper Publishing Co.*, 271 F. Supp. 395, 398, (D. Ore. 1967), *aff'd sub nom. Dubay* v. *Williams*, 417 F.2d 1277 (9th Cir. 1969). *See also, Thomas* v. *Gulfway Shopping Center, Inc.*, 320 F. Supp. 756, 762 (S.D. Tex. 1970). A crucial element in determining whether "property" of the Bankrupt was transferred is therefore whether the Bankrupt's estate was diminished, that is, whether the alleged property could have been excluded from others' use and retained long enough to be available to satisfy creditors.

The Bankrupt was rendered financially incapable of retaining Otte or its employees, or in fact of lawfully continuing in operation, by April 22, 1970. It could not lawfully exclude others from hiring its employees or servicing its customers. The Bankrupt's estate was not diminished as the result of Watts hiring Otte and the former employees nor by Otte's solicitation of former customers. Because there was no diminution of the Bankrupt's estate, it necessarily follows that hiring the Bankrupt's employees and servicing its customers was not a

fraudulent transfer. The First Circuit's holding to the contrary thus was inconsistent with the language and policy of the Bankruptcy Act and the Bankruptcy Code.

Conclusion

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on July 19, 1982.

DATED: November 3, 1982

Respectfully submitted,

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APPENDIX

United States Court of Appeals
For the First Circuit

Nos. 81-1697
81-1698
81-1699
81-1700

ROBERT ROBINSON,
TRUSTEE IN BANKRUPTCY OF D.C. SULLIVAN & CO., INC.,
PLAINTIFF-APPELLEE,

v.

WATTS DETECTIVE AGENCY, INC., ET AL.,
DEFENDANTS-APPELLANTS.

DANIEL SULLIVAN,
DEFENDANT-APPELLANT.

BILLY R. OTTE,
DEFENDANT-APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. DAVID S. NELSON, *U.S. District Judge*]

Before
CAMPBELL, BOWNES AND BREYER, *Circuit Judges*.

Timothy H. Gailey, with whom *Mark N. Polebaum*, and *Hale and Dorr* were on brief, for Watts Detective Agency, Inc., et al.
James F. Freeley, with whom *Feeney & Freeley* was on brief, for Daniel Sullivan.

Daniel F. Featherson, Jr., with whom *Benjamin Goldman* was *Benjamin Brown*, for Billy R. Otte on brief, for Robert Robinson, Trustee.

July 19, 1982

BOWNES, *Circuit Judge*. This appeal follows an action brought by the trustee in bankruptcy of D.C. Sullivan Company against the defendants-appellants to recover the value of assets allegedly misappropriated from the bankrupt Sullivan Company. The appellants are Watts Detective Agency, Inc., the recipient of the assets, Consolidated Services Corporation, Watts' parent corporation, and Christopher P. Recklitis, president of Watts and Consolidated (collectively, the Watts appellants); Daniel C. Sullivan, president and a director of the bankrupt company; and Billy R. Otte, vice-president and a director of the bankrupt. The complaint alleged three separate counts, each a different theory of liability, against all five defendants: (I) that within a year prior to Sullivan Company's bankruptcy defendants caused to be transferred to Watts the company's assets without fair consideration, rendering the company insolvent, in violation of the fraudulent conveyance section of the former Bankruptcy Act, 11 U.S.C. § 107(d)(2)(a) (repealed 1978);[1] (II) that defendants caused such transfer to be made within a year prior to the company's bankruptcy with the intent to hinder, delay or defraud creditors in violation of former 11 U.S.C. § 107(d)(2)(d); and (III), a pendent state action claim, that Sullivan and Otte, in facilitating the transfer, breached their fiduciary duty to Sullivan Company and the other defendants all knowingly participated in the breach of duty. The jury found all five

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[1] Former 11 U.S.C. § 107(d)(2)(a) provides:

> Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent[.]

At the time this action was commenced, the former Act was still in effect.

defendants liable for the fraudulent conveyance under Count I, found all defendants not liable on Count II, found only Sullivan and Otte liable for breach of fiduciary duty under Count III, and awarded damages to the trustee in the amount of $750,000.

The defendants all moved for judgment notwithstanding the verdict pursuant to Federal Rule of Civil Procedure 50(b) and in the alternative for a new trial pursuant to Federal Rule of Civil Procedure 59(a). In a lengthy and thorough opinion the district court denied the various motions, from which decision defendants appeal in addition to appealing generally from the judgment on the grounds of claimed trial errors. The trustee cross-appeals the district court's denial of his motion to alter or amend judgment to include prejudgment interest on the verdict and to enter judgment against Watts, Consolidated and Recklitis on Count III.

We begin by setting forth the relevant facts, mindful that we review the evidence and inferences faily drawn therefrom in the light most favorable to the prevailing party. *DeVasto* v. *Faherty*, 658 F.2d 859, 861 (1st Cir. 1981); *Engine Specialties, Inc.* v. *Bombardier Ltd.*, 605 F.2d 1, 9 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980).

The evidence consisted largely of admitted facts and the testimony of Otte, Sullivan and Recklitis. The Sullivan Company was in the business of supplying security guards to businesses, industrial plants and others. Sullivan, who was president and a director, was in charge of the company's finances. Otte, vice-president and a director, was in charge of general management of operations for the company. The company's financial difficulties started prior to the time of the transfer at issue. Since 1968 it had owed the Internal Revenue Service for unpaid taxes which amounted by April 1970 to over $210,000. In 1969 and 1970 its sales were consistently exceeded by its disbursements, and for three weeks prior to the alleged transfer it issued payroll checks which were returned because of insufficient funds.[2]

[2] The Sullivan Company payroll was substantial; the company employed approximately 225 full and part-time guards.

In May 1969 Recklitis, on behalf of Consolidated, negotiated with Otte over the possible purchase of the company. Nothing resulted from these negotiations. By early 1970 the IRS was pressing the company to pay its past due taxes, and, at that time, Otte and Recklitis met again to discuss a possible purchase by Consolidated or Watts.[3] In mid-April Recklitis made his first offer for the operating portion of the company's business, i.e. its customer accounts, employees and goodwill. He offered to pay in installments for each of the succeeding four years an amount equivalent to five percent of that portion of the gross sales attributable to Sullivan Company customers. Because the approximate annual gross sales of Sullivan was one million dollars, this meant a contemplated purchase price of two hundred thousand dollars. Otte was offered a job with Watts as part of the deal. The offer to purchase the company was contingent on agreement by the IRS to settle its claim.

Shortly after the offer was made, Otte telephoned all of Sullivan Company's seventeen customers to advise them of the potential sale, to assure them of uninterrupted guard service and to learn which customers would remain. The customers apparently indicated they would remain with the new company provided there were continuity of service.

The first offer by Recklitis was rejected by Daniel Sullivan as being too low. Within days, the IRS announced its intention to levy on Sullivan Company's past accounts receivable which, as of April 20, 1970, amounted to approximately $38,000. Cash was needed by the company to meet its weekly payroll, which was over $15,000, and within a few days Recklitis made his second offer to purchase the company. This time the proposed price was $50,000 cash and two percent of the gross sales per year for four years, which, calculated in the same manner as the first offer, amounted to a purchase price of approx-

[3] Consolidated, parent company to several service businesses, had in the interim purchased Watts, another security guard business.

imately $130,000. This offer was also contingent on IRS approval. Neither the first nor second Recklitis offer included the assumption of the debts of Sullivan Company; only its operations were the subject of the negotiations.

On April 22, 1970, Recklitis, Otte and Sullivan met with representatives of the IRS in hopes of arriving at an arrangement that would meet with everyone's satisfaction. The IRS would not approve Recklitis' second offer and, at 5:00 P.M. the IRS agent walked out of the meeting stating that the company's accounts receivable would be levied upon the next morning. At that point, according to Otte, he, Sullivan and Recklitis believed that in light of the impeding levies, the company was out of business. Recklitis then offered Otte a job with Watts, which Otte accepted, promising to contact the customer accounts and guards of Sullivan Company to try to secure them for Watts. According to Otte, Recklitis stated that "it's a dirty way to do it, but these accounts are up for grabs." During this conversation, Sullivan walked out "completely demoralized," according to his testimony, and told Otte to do whatever he had to do. At no time did Otte and Sullivan discuss the effect of a Watts takeover on Sullivan Company's creditors either with each other or with the other directors of the company.

That evening and the next morning Otte, on behalf of Watts, began calling Sullivan Company customers and supervisory personnel to arrange for uninterrupted guard service. He conducted this activity from the Sullivan Company offices and continued to utilize the offices, telephone and records of the company for a brief period. Nine of the company's former customers were serviced by Watts on April 23 and within several days Watts was servicing four more; of the seventeen customer accounts belonging to Sullivan Company on April 22, thirteen were ultimately serviced by Watts. In the year from April 23, 1970, to April 22, 1971, Watts received approximately $680,000 in gross sales from these former customers of Sullivan Company.

The trustee alleged in his complaint that what was transferred to Watts fraudulently and as a breach of fiduciary duty were the "operating and administrative organization of the Sullivan Company, its employees, customers, goodwill and business." All appellants argue that there was no evidence at trial that any "property," as that term is used in the Bankruptcy Act's fraudulent conveyance provision, was transferred.[4] In addition, they claim there was no proof of the amount by which the bankrupt's estate was purportedly diminished. Sullivan also argues that there was insufficient evidence to show he participated in the fraudulent transfer (Count I) and that the evidence does not prove that he breached his fiduciary duty to the corporation (Count III). Otte adopts all the arguments of his co-appellants.

Motions for Judgment N.O.V.

Our standard of review of a denial of a motion for judgment notwithstanding the verdict is well settled. "The motion is properly granted only when, as a matter of law, no conclusion but one can be drawn." *Rios* v. *Empresas Lineas Maritimas Argentinas*, 575 F.2d 986, 990 (1st Cir. 1978). *See also DeVasto* v. *Faherty*, 658 F.2d at 860; *Hubbard* v. *Faros Fisheries, Inc.*, 626 F.2d 196, 199 (1st Cir. 1980).

We turn first to appellants' argument that no property of the bankrupt company was transferred to Watts.[5] Specifical-

[4] This appears to be the only issue as to whether a fraudulent transfer occurred. The defendants did not claim that fair consideration was paid to Sullivan Company, nor is there any dispute that the transaction occurred during the statutory period when the company was or was thereby rendered insolvent.

[5] Appellants have not challenged the implicit finding of the jury that, as the Bankruptcy Act requires, the transfer here was made by the "debtor." Both Sullivan (the company's president) and Otte (the vice-president) were directors of D.C. Sullivan & Co. and both took part in the meeting on April 22. Otte was quite active in helping Recklitis obtain the "property" transferred, and Sullivan did nothing to stop the transfer. Of course, had these men been mere supervisory employees not empowered to act on behalf of the company, a different situation would have been presented.

ly, they claim: (1) that Otte and Sullivan Company guards were not property; (2) that the Sullivan Company customers were not property of the bankrupt and that no protected list of customer names was transferred; and (3) that, because the Sullivan Company was no longer an ongoing business by 5:00 P.M. on April 22, no goodwill was transferred.

The term "property" in the Bankruptcy Act "has been construed most generously" for the purpose of protecting the creditors of the bankrupt. *Segal* v. *Rochelle*, 382 U.S. 375, 379 (1966). Generally speaking, it is "anything of value — anything which has debt paying or debt securing power." *Pirie* v. *Chicago Title and Trust Co.*, 182 U.S. 438, 443 (1901).

This expansive definition of property in the bankruptcy context is not limited to tangible assets. Items such as the customers routes of driver-salesmen for a pastry distributor could be property of the bankrupt company. *In re Rubin*, 378 F.2d 104 (3d Cir. 1967). Milk routes, found to be of substantial value to a bankrupt dairy company, have been held to be property of the bankrupt's estate. *Summe* v. *Chapman Dairy Company*, 238 F.2d 3 (8th Cir. 1956).

In *Heyl* v. *Emery and Kaufman, Ltd.*, 204 F.2d 137 (5th Cir. 1953), the court found insurance policy "expirations" — information which represents the right to solicit renewals of customers — to be valuable property, and a bankrupt tenant's month-to-month tenancy was held to be a valuable property right in *Lesser* v. *Mendelson*, 352 F. Supp. 321 (S.D.N.Y. 1971), *aff'd sub nom. Lesser* v. *Jewel Factors Corp.*, 470 F.2d 108 (2d Cir. 1972). In both cases the courts, in ascribing value to these items, focused on the value to the bankrupt business of the expectation of continuity in these relationships. *Heyl*, 204 F.2d at 140; *Lesser*, 352 F. Supp. at 327.

The trustee argues that the transfer to Watts of the Sullivan Company guards, customers and goodwill was essentially the transfer of the continuity of service of the company's opera-

tion. In its opinion below the district court highlighted the company's reasonable expectancy of continued relationships with its employees and customers and the value that this continuity imported to these relationships. There was evidence that Sullivan Company had maintained the loyalty of customers and employee guards for years. Sullivan testified that providing uninterrupted guard service "was everything" in keeping customers and that Otte was the key to this continuity. As a former FBI agent with contacts in the security community, Otte was successful at obtaining customers and retaining them in a highly competitive business. And, because of the high regard in which he was held by company employees, he was instrumental in keeping them over the years, which was the key to being able to continue to provide continual guard service to customers. In addition, there was evidence that a number of customers required guards with special security clearances and that, despite a general shortage of such guards, Sullivan Company was always able to provide them.

The court engaged in a lengthy in-depth analysis of the transfers of the guards, customers and goodwill and held that they were each susceptible of having value and, therefore, of being "property" in a bankruptcy setting. We agree. We add, however, that what was transferred to Watts amounted in the aggregate to a transfer of the business itself. The whole was greater than its parts.

The evidence showed that Otte's relationships with the supervisors, guards and customers of Sullivan Company were what provided the necessary continuity for this service business. Recklitis was fully aware that because of the loyalty of the customers, supervisors and guards to Otte, he was the key to obtaining and keeping the company's customers without a break in the continuity of operations.[6] Through hir-

[6] Recklitis was further able to insure continuity on the part of employees by authorizing Otte to tell them that their past unpaid wages would be paid by Watts if they came along.

ing Otte, Watts was able to obtain thirteen out of Sullivan Company's seventeen customers and enough of its guards and supervisors to continue providing service to these accounts.

In short, the jury could have found on this evidence that, in hiring Otte, Watts effected the transfer of precisely that for which it had been bargaining previously with Otte and Sullivan and had been prepared, until the previous day, to purchase — the operating portion of the Sullivan Company business — and that this package was acquired by Watts on and after April 23, 1970.

Turning to the problem of whether anything of real *value* (such as goodwill) was transferred to Recklitis, the critical fact question for the jury was whether or not at 5:00 P.M. on April 22, notwithstanding the impending IRS levies and the parties' doubts about the company's viability, Sullivan Company was still a going concern. Appellants argue, naturally, that it was not. They support this claim with citations to cases in which the companies at issue were either in existence only nominally or had ceased operations. *See Trask* v. *Susskind*, 376 F.2d 17 (5th Cir. 1967); *Mossler Acceptance Company* v. *Martin*, 322 F.2d 183 (5th Cir. 1963), *cert. denied*, 376 U.S. 921 (1964); *Langham, Langston & Burnett* v. *Blanchard*, 246 F.2d 529 (5th Cir. 1957); *In re Windsor Industries, Inc.*, 459 F. Supp. 270 (N.D. Texas 1978). But they offer no authority for the proposition that a company continuing to operate, albeit in serious financial difficulty, is not a going concern.

In a case defining "going concern value" of a business one court commented, "We do not think that the financial outlook of the debtor corporation, or the intention of its stockholders and directors to continue business or to liquidate at an early date, is determinative of the question." *In re Nathanson*, 64 F.2d 912, 913 (6th Cir. 1933). Instead, the court looked to see "[i]f the business is in fact being conducted at the time" and found that it was, despite an adverse financial picture. *Id.*

There is no dispute that on April 22 the Sullivan Company customers were being served by Sullivan Company guards. Appellants argue that, as a matter of law, as of 5:00 P.M. on that date, with the certainty of IRS levies on accounts receivable the next morning, the company was in effect out of business because it would be without funds to pay its employees. We disagree. Under the facts here, the question whether the company was a going concern was one of fact to be determined by the jury. Sullivan testified that in the past, when he had come upon hard times, he had been fortunate in obtaining cash on short notice. He stated that he could have made telephone calls on the afternoon of April 22 to his various sources and might have been able to borrow more money. There was also evidence that in the past employees had continued to work despite receiving dishonored or no paychecks. There is nothing in the record to indicate that the guards would not have appeared the next morning at their regular job sites on schedule. The accounts were still being serviced by Sullivan Company and there was no evidence that they could not have been serviced by the company the following day or for an indefinite period thereafter. Thus, having found a transfer to Watts of the operating portion of the Sullivan Company business, the jury was warranted in finding that the transfer was of valuable property.

The Watts appellants further claim that there was insufficient proof as to the amount by which the bankrupt's estate was diminished as a result of the fraudulent transfer. In their motion for directed verdict they asserted that "plaintiff has introduced no evidence . . . that any property asserted to have been so transferred decreased the value of the Sullivan Company's assets." They then argued for a judgment n.o.v. on the grounds that "there was insufficient evidence to prove . . . that any property asserted to have been so transferred decreased the value of the Sullivan Company's assets, and there was no

evidence, or insufficient evidence, to warrant the jury verdict for the plaintiff or the amount of damages." On appeal, appellants appear to join these grounds as one issue. But because they were distinct below and because the specific question of damages was not raised in their motion for directed verdict, we agree with the district court that the damages issues was waived as a ground for a judgment n.o.v. *See Matinez Moll* v. *Levitt & Sons of Puerto Rico, Inc.*, 583 F.2d 565, 568-69 (1st Cir. 1978).[7]

Appellants' claim as to the diminution in value of the bankrupt's assets is essentially the same as their first argument that no property, i.e. nothing of *value*, passed from Sullivan Company to Watts. We have already determined that the evidence permitted a finding that the company was still a going concern at the time of the transfer. The same evidence which supported a finding that this operation had value also sustains the finding that the bankrupt's estate suffered a loss to the extent of the transfer.

Finally, the Watts appellants argue that the lower court erred in denying their motion by relying on facts not in evidence and contrary to the parties' binding admissions. This claim relates to the court's finding that certain individual items of property had value and its finding that the Sullivan Company customer list was transferred. Because there was sufficient evidence to sustain a finding that the subject of the transfer was the Sullivan Company business itself, we need not address the district court's treatment of the transfers separately.[8] We comment, however, briefly on the claim that the court's finding relative to the customer list was contrary to an admitted fact.

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[7] We do, however, consider it *infra* as a ground stated in appellants' motion for a new trial.

[8] We have reviewed the specific claimed errors, however, and are satisfied that nothing in the district court's analysis is inconsistent with a fair reading of the record in the light most favorable to the trustee.

Admitted Fact #54 states: "Prior to April 22, 1970, Watts was already aware of the names of Sullivan Company's customers." Appellants argue that this stipulation precludes a finding that there was any transfer to Watts of the Sullivan Company's customer list. The acquisition of this information by Watts, however, occurred as a result of its access to the company's books during its prior negotiations to purchase the company. Moreover, the evidence supports a finding that due to Otte's particular expertise and ongoing relationships with these customers, the transfer of the customers to Watts could not have occurred but for his new position with Watts as of April 22. The jury could reasonably have found that without Otte's personal ability to retain the customers and the necessary guards to provide them uninterrupted service, the customer accounts could not have been taken over by Watts. Watts' prior knowledge of the customers' names, then, is beside the point.[9]

We turn now to the claims of Sullivan and Otte. They make only two new arguments in addition to those of the Watts appellants. They claim that they could not be liable for a fraudulent conveyance (Count I) because they did not actively participate in any transfer and that the evidence does not support the finding that they breached their fiduciary duty to Sullivan Company in permitting its takeover by Watts (Count III). We address the breach of duty argument first which, as a pendent state claim, is to be decided under Massachusetts law.

It is a basic principle of corporation law that Sullivan and Otte, as directors of the Sullivan Company corporation, owed a fiduciary duty to the corporation to protect its interests. *See, e.g., Production Machine Co.* v. *Howe*, 327 Mass. 372, 99 N.E.2d 32 (1951). "If the director does not exercise sufficient care and sound personal judgment in his duties, he will be

[9] Recklitis testified that, even knowing who the company's customers were, it would not have been "proper" for Watts to have attempted to lure them away.

subject to a personal liability for mismanagement or negligence." 13A Massachusetts Practice § 465 at 207 (1971) (footnote omitted). Liability may be found even in the absence of bad faith or dishonesty on the part of a director if he fails to recognize his fiduciary duty. *Production Machine Co.* v. *Howe*, 327 Mass. at —, 99 N.E.2d at 36. Moreover, affirmative malfeasance by a director is not necessary in order to constitute a breach of duty; mere passivity can rise to the level of negligence if the director does not "exercise the degree of care which a prudent person ordinarily would use as a director." *Hathaway* v. *Huntley*, 284 Mass. 587, 188 N.E. 616, 618 (1933).

Our review of the record reveals sufficient evidence on which the jury could base a finding of breach of fiduciary duty by both Sullivan and Otte through their participation in the transfer of the corporation's property without fair consideration while the company was insolvent. Sullivan's testimony was replete with virtual admissions of his own negligence. When asked at trial to state the cause of Sullivan Company's serious financial problems prior to April 1970, he stated that it was largely due to his own mismanagement of the business. At no time did he or Otte discuss the effect of a takeover by Watts on the company's creditors, nor did they consider discussing the matter with the other directors and stockholders. Sullivan also testified that the business was still alive when he and Otte "handed it" to Recklitis, that he probably could have kept the business running for a while if he had pursued his sources of cash at the time. And, finally, after participating in an attempt to sell the business and believing it, at 5:00 P.M. on April 22, to be worth one million dollars, Sullivan "stopped thinking" and walked away from the business. The jury could reasonably have found this to have been an abandonment by Sullivan of his fiduciary duty.

As to Otte, the evidence supports a finding of a more affirmative breach of duty. Although one may be sympathetic to his

feeling that as of 5:00 P.M. on April 22 he was unemployed and that his own personal interests lay in accepting Recklitis' job offer, he was still an officer and director of Sullivan Company to which he continued to owe a fiduciary duty. His agreement to work for Watts and to attempt to bring with him all of the customer accounts and guards of Sullivan Company was the death blow to the corporation of which he was an officer and director. Otte's abandonment of the sinking Sullivan Company, taking with him its only operating assets, for a safe berth with another corporation was sufficient grounds for a finding that he breached his fiduciary obligations to Sullivan Company.

We now turn to the issue of Sullivan and Otte's liability under Count I. Although not raised by either of them below or before us, we think that under these facts there can be no liability as a matter of law because neither Sullivan nor Otte received any of the fraudulently transferred property.[10] The Act contemplates recovery by the trustee only from recipients of fraudulently transferred property.

Our ruling is informed by the reasoning of the Ninth Circuit in *Elliott* v. *Glushon*, 390 F.2d 514 (9th Cir. 1967), which held that the trustee in bankruptcy could not recover the value of fraudulently transferred property from an attorney who had acted only as an escrow holder and attorney for certain participants in the admitted transactions but had never received any of the property involved. In reaching its conclusion, the court first examined the pertinent sections of the Bankrutpcy Act and noted that they "suggest with some certainty that recovery may be had only against persons who have received the property in question." *Id.* at 515. Section 67(d) provides

[10] Because this issue was not raised below, we would ordinarily not consider it for the first time on appeal. *Johnston* v. *Holiday Inns, Inc.*, 595 F.2d 890, 894 (1st Cir. 1979). We recognized, however, in *Dobb* v. *Baker*, 505 F.2d 1041 (1st Cir. 1974), that we might deviate from this rule where the new ground for reversal is "so compelling as virtually to insure appellant's success." *Id.* at 1044. Here, the issue turns on an open and shut question of law.

that a transaction found to be fraudulent shall be "null and void against the trustee. . . ." 11 U.S.C. § 107(d)(6). Section 70, which vests title in the trustee to, *inter alia*, property fraudulently transferred by the bankrupt, 11 U.S.C. § 110(a)(4), gives the trustee his procedural rights to enforce section 67(d) and provides that if a transfer is made which is fraudulent under any applicable federal or state law, "[t]he trustee sh all reclaim and recover such property or *collect its value from* and avoid such transfer . . . against *whoever may hold or have received it*. . . ." 11 U.S.C. § 110(e)(2) (emphasis added).

Noting a conflict among a few earlier cases and distinguishing the leading one,[11] the *Elliott* court acknowledged the temptation to borrow from the principle of joint liability among tortfeasors in order to permit recovery against a nonrecipient. It nonetheless held that the purpose of sections 67(d) and 70 of the Act

> is clearly to preserve the assets of the bankrupt; they are not intended to render civilly liable all persons who may have contributed in some way to the dissipation of those assets. The Act carefully speaks of conveyances of property as being "null and void," and authorizes suit by the trustee to "reclaim and recover such property or collect its value." The actions legislated against are not "prohibited"; those persons whose actions are rendered "null and void" are not made "liable"; and terms such as "damages" are not used. The legislative theory is cancellation, not the creation of liability for the consequences of a wrongful act.

Id. at 516 (footnote omitted).

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[11] *Brainard* v. *Cohn*, 8 F.2d 13 (9th Cir. 1925), a case decided over four decades before the same circuit, permitted recovery against a nonrecipient of fraudulently transferred property. In that case, however, a conspiracy had been alleged, and the court held full recovery to be proper against a conspirator who received some but not all of the transferred merchandise. Central to that decision was the fact that the conspirators had intermixed the bankrupt's property with their own. *Id.* at 15.

Moreover, the court reasoned, the trustee may still have a right of action for fraud or deceit under state law against those who participated in the transaction. Recovery under the Bankruptcy Act, however, embraces only the recipients of the transferred property. We believe this analysis is correct and adopt it, as other courts have done. *See, e.g., Klein* v. *Tabatchnick*, 610 F.2d 1043, 1048 n.4 (2d Cir. 1979); *Jackson* v. *Star Sprinkler Corp.*, 575 F.2d 1223, 1234 (8th Cir. 1978). *See also In re Christian & Porter Aluminum Co.*, 584 F.2d 326, 339 (9th Cir. 1978).

The judgments against Sullivan and Otte on Count I must be reversed. This makes it unnecessary to discuss their claim that there was no evidence that they actively participated in any transfer of the assets of Sullivan Company, which, we note, is untenable as to Otte.

Claimed Trial Errors

The Watts appellants claim first and foremost that Sullivan's opinion as to the value of Sullivan Company was erroneously admitted into evidence. Sullivan was permitted to testify that, in his opinion, the business was worth approximately one million dollars at the time of the transfer to Watts. He relied in part for this opinion on his understanding that service businesses such as his are valued at one dollar for each dollar of annual gross sales. Because Sullivan Company had accounts worth one million dollars as of April 1970, this was the figure he used.

The district court permitted Sullivan to testify to his opinion on the value of the business because, as president and majority stockholder, he was the owner of the property. The court noted that this opinion testimony of an owner is admissible

> either as an opinion by a lay witness "based on . . . personal perception" and "helpful to a clear understanding of his testimony of the determination of a fact in issue" under [Federal] Rule [of Evidence] 701, or as an expert opinion by one who is "qualified as an expert by knowledge . . . [or] experience" under Rule 702.

The accompanying Advisory Committee Notes on Rule 702 make clear that the rule encompasses more than merely an expert in a technical sense. Rather, "within the scope of the rule are not only experts in the strictest sense of the word, e.g. physicians, physicists, and architects, but also the large group sometimes called 'skilled' witnesses, such as bankers or landowners testifying to land values." Fed. Rules Evid. Rule 702, 28 U.S.C.A. at 462 (1975).

An owner of a business is competent to give his opinion as to the value of his property. *Kestenbaum* v. *Falstaff Brewing Corp.*, 514 F.2d 690, 698 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976). *See United States* v. *Sowards*, 370 F.2d 87, 92 (10th Cir. 1966). Whether or not his opinion is accurate goes to the weight of the testimony, not its admissibility. *Meredith* v. *Hardy*, 554 F.2d 764, 765 (5th Cir. 1977). *Cf. Ford Motor Co.* v. *Webster's Auto Sales, Inc.*, 361 F.2d 874, 886 (1st Cir. 1966) (plaintiff's method of valuation of damages attacked by defendant; accuracy of plaintiff's testimony goes to weight not admissibility). An owner's opinion as to value has been excluded where the opinion rested on hypothesized facts or speculation on circumstances not in existence. *See Klapmeier* v. *Telecheck International, Inc.*, 482 F.2d 247, 253 (8th Cir. 1973); *Pacific Mailing Equipment Corp.* v. *Pitney Bowes, Inc.*, 499 F. Supp. 108, 119 (N.D. Cal. 1980).

Appellants claim that Sullivan's opinion was not based on his personal knowledge as the owner of the company but solely on the opinions of others. This claim derives from Sullivan's testimony that he became aware of the gross sales valuation formula through talking with other knowledgeable businessmen several years before and again after Recklitis' offer. He stated that he also talked to "other financial people" in Boston who confirmed that the gross sales method was an accurate measure of the value of a service company. We note that this is a common and reliable way of obtaining knowledge. Most knowledge has its roots in hearsay.

Appellants are mistaken, moreover, in their assertion that his opinion came solely from the opinions of others. Sullivan's testimony was that he relied on this valuation formula in part, and there was evidence from which the district court properly could have found Sullivan's substantial personal familiarity with the property such that his opinion would be admissible. He had been president and majority or near-majority stockholder in the business since its beginnings in the late 1950's and had been in charge of the finances of the company, securing loans from banks and other sources. He watched his company expand to a million dollars worth of business in the year prior to the takeover due to loyal customers who had sizeable accounts and paid their bills regularly. These facts, combined with other evidence indicating Sullivan's intimate familiarity with his business, support the district court's determination that his opinion as to value was admissible. The testimony was subject to severe attack on cross-examination. "[W]ith the jury as fact finder shouldering the responsibility of judging the credibility of the witness ... and assessing the weight of opinion testimony," *Kestenbaum* v. *Falstaff Brewing Corp.*, 514 F.2d at 699, we uphold the lower court's determination of the admissibility of this evidence as within its sound discretion. *See Mercado* v. *Wollard Aircraft Equipment, Inc.*, 574 F.2d 654, 655 (1st Cir. 1978); *Redding* v. *Picard Motor Sales, Inc.*, 403 F.2d 788, 792 (1st Cir. 1968).

Appellants also argue strenuously that the district court erred in allowing the trustee to introduce evidence of Recklitis' 1979 federal conviction for fraud. They claim that Federal Rule of Evidence 609, permitting inquiry about a conviction during cross-examination, is designed to limit the use of such evidence to instances where a witness voluntarily places his credibility in issue by testifying on direct examination. Here, Recklitis was called as a witness by the trustee, who elicited the information during direct examination. The trustee, on the other hand, asserts that because Recklitis was an opposing

party, when he was called to testify he was being cross-examined in the first instance, and, therefore, Rule 609 permitted the inquiry. We conclude that the evidence was admissible.

Recklitis, as a named defendant and president of Watts, was an adverse party called as a witness by the plaintiff in his case-in-chief. Federal Rule of Civil Procedure 43(b) governs the mode of inquiry of this type of witness and provides in pertinent part:

> A party may call an *adverse party* or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict *and impeach him in all respects* as if he had been called by the adverse party....

(emphasis added). Federal Rule of Evidence 607 provides: "The credibility of a witness may be attacked by any party, including the party calling him." Read together, these two rules allow, in a civil case, the impeachment of an adverse party by the party calling him through evidence of a prior criminal conviction. Impeachment under Rule 607 is not limited to occasions where the party calling the witness is surprised or misled by the testimony. *Scholz Homes, Inc.* v. *Wallace*, 590 F.2d 860, 863 (10th Cir. 1979). "Moreover, Rule 607, by its terms, places no limitation on the manner in which a party may impeach his own witness, and there is no reason to believe that such a witness cannot be impeached by evidence of a prior conviction." *United States* v. *Dixon*, 547 F.2d 1079, 1082 n.2 (9th Cir. 1976). There was no error in admitting this evidence.

We have carefully considered appellants' other claims[12] of trial error and find them to be without merit.

[12] They challenge a portion of the court's charge to the jury and its failure to give a requested instruction. We find no error. Their claim that the verdict resulted from confusion, passion and prejudice on the part of the jury is rejected.

Motions for New Trial

We turn now to appellants' claims that their motions for new trial based on insufficiency of the evidence were improperly denied by the district court. A motion for new trial on this ground is subject to a standard of review as strict as that for a judgment n.o.v. and we will reverse only if we find an abuse of the trial court's discretion. *Hubbard* v. *Faros Fisheries, Inc.*, 626 F.2d at 200; *Rios* v. *Empresas Lineas Maritimas Argentinas*, 575 F.2d at 990. We have expressed the test for granting a new trial as follows:

> A trial court, in assessing whether to grant a new trial for lack of legally sufficient evidence, does not properly do so merely because it might have come to a result different from that reached by the jury. The district court should order a new trial only when convinced that a miscarriage of justice would otherwise obtain. Where credibility of witnesses is at issue, special care should be taken not to invade the province peculiarly pertaining to the jury.

Rios v. *Empresas Lineas Maritimas Argentinas*, 575 F.2d at 990 (citations omitted). Applying this standard, we conclude that there was sufficient evidence from which the jury could find a transfer of property to Watts which diminished the assets of the bankrupt.

Turning to appellants' claim that the trustee failed to prove damages, we find that there was sufficient evidence to allow the jury to award damages of $750,000. Sullivan and Otte both testified that they believed the company to be worth one million dollars, Sullivan asserting this to be the value at the time of the transfer.[13] There was evidence that in the year following the takeover $680,000 of Watts' gross sales was attributable to customer accounts it had taken from Sullivan Company.

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[13] We observe that as parties-defendants, Otte's and Sullivan's testimony as to the value of the business before its takeover was against their own interests, not only on the issue of damages but also as to their breach of duty to the corporation.

Appellants argue that the only evidence before the jury on the damages issue was in the nature of "guesswork" and "speculation." They use as authority antitrust cases in which plaintiffs' damage claims were based on speculating about events that did not and/or might not occur. *See, e.g., Keener* v. *Sizzler Family Steak Houses*, 597 F.2d 453, 457 (5th Cir. 1979); *Klapmeier* v. *Telecheck International, Inc.*, 482 F.2d at 253. Suffice to say that the fact situations in these cases are inapposite to this. The evidence of damages here — of the loss to Sullivan Company of its operating assets — was not a matter of conjecture. The jury was warranted in finding that the business was still valuable on April 22 and that its transfer without fair consideration while the company was insolvent was fraudulent. It was free to accept or reject or give whatever weight it deemed appropriate to the evidence of value at the time of the transfer. Sullivan did not hypothesize in his testimony; he did not say that the business would have been worth a million dollars *if* the IRS levies were not imminent. Indeed, on cross-examination by defense counsel he stated that, even in light of the levies, the business was still worth that amount because of the type of customers, the continuity established and maintained, and the fact that the customers regularly paid their bills on time. Sullivan's opinion together with the figure of Watts' subsequent gross sales from the company's former customers were sufficient to send the issue of damages to the jury.

Cross-Appeal

We now come to the cross-appeal of the trustee. Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, the trustee filed in the district court a motion to alter or amend judgment. The motion was granted with respect to the technical request to change the name of the plaintiff to the successor trustee but was denied in two other respects. The trustee claims the court erred in denying his request for the addition of prejudgment

interest to the verdict on Count I and for the addition of Watts, Consolidated and Recklitis to those found liable on Count III.

Because Count I of the complaint stated a cause of action arising under the Bankruptcy Act, whether or not the trustee is entitled to prejudgment interest as an element of damages is a matter of federal law. *See Rodgers* v. *United States*, 332 U.S. 371, 373 (1947); *Royal Indemnity Co.* v. *United States*, 313 U.S. 289, 296 (1941); *Furtado* v. *Bishop*, 604 F.2d 80, 97 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980); *Moore-McCormack Lines* v. *Amirault*, 202 F.2d 893, 897 (1st Cir. 1953). In the absence of a general federal statute or a provision in the Bankruptcy Act on prejudgment interest, we turn to federal common law for guidance.

From the leading case of *Roth* v. *Fabrikant Bros.*, 175 F.2d 665 (2d Cir. 1949), comes the general rule that a prevailing plaintiff is entitled to prejudgment interest as an element of damages when the amount of his claim is either "liquidated" or "reasonably ascertainable by reference to established market values." *Id.* at 669. It has been said that the court's prejudgment interest inquiry is reduceable to "whether the demand is of such a nature that its exact pecuniary amount was either *ascertained*, or ascertainable by simple computation, or by reference to generally recognized standards such as market price[.]"[14] Sedgwick, Damages § 300 at 571 (9th ed. 1912) (emphasis in original). Thus in *Roth*, a case involving a voidable preference and a fraudulent transfer under the Bankruptcy Act, because the preference claim involved recovery of a definite sum, interest thereon was allowed. The court held that recovery on the transfer claim on the other hand did not entitle the plaintiff to interest because the amounts of those

[14] A simple example of a claim that is ascertainable is the claim for payment for goods sold at a unit price. The contract does not call for a specified, liquidated amount, but simple calculation accomplished by multiplying the number of units sold times the price, will yield a precise measurement.

D. Dobbs, Law of Remedies § 3.5 at 167 (1973).

claims were not reasonably certain, noting that "there could hardly be a situation where the value of the property transferred was more uncertain than that of the highly speculative items of jewelry involved in the plaintiff's claims." 175 F.2d at 669. Apparently contributing to the court's conclusion that the value was uncertain and therefore not meriting interest was its finding that "[t]he testimony differed as to the consideration which might fix the value of the different items." *Id.* at 668.

In *Jones* v. *United States*, 258 U.S. 40 (1922), the Supreme Court upheld an award of prejudgment interest on a claim that timber land was converted, where the value of the land was made ascertainable by the testimony of timber experts as to the current market value of similar land. Interest was properly awarded, the Court held, because the owner was deprived of "property having a definite or ascertainable value." *Id.* at 49.

Applying this analysis, the district court found that the damages to Sullivan Company were not ascertainable with sufficient certainty to require the addition of prejudgment interest. With this conclusion we agree.

The trustee claimed, in bringing the action, the right to recover from the defendants the value of what was transferred, i.e. the operating portion of Sullivan Company. The amount in dispute was not liquidated, there was no transfer of a definite sum of cash, and the parties did not and do not agree on the value of what was transferred. *See Palmer* v. *Radio Corp. of America*, 453 F.2d 1133, 1140 (5th Cir. 1972). The evidence as to the value of the transferred property ranged from one million dollars to the $680,000 figure representing Watts' gross receipts from thirteen out of the seventeen former Sullivan Company customers for the year following the takeover.[15] There was no evidence proferred by either party

[15] It would appear that a combination of these figures may have formed the basis of the jury's verdict of $750,000. Watts retained approximately 75% of Sullivan Company's former customers. This percentage may have been applied to the total gross receipts of $1,000,000 from all the seventeen Sullivan Company customers.

as to any current market value for guard service business or for service businesses generally, leaving the jury without the guidance of an established, recognized standard of prices. *See Jones* v. *United States*, 258 U.S. at 49; *Roth* v. *Fabrikant Bros.*, 175 F.2d at 669, 1 Sedgwick, Damages § 300 at 571. We conclude, as did the district court, that the damages were not ascertainable before trial with reasonable certainty and that, therefore, the trustee was not entitled to prejudgment interest except in the discretion of the jury. *See Furtado* v. *Bishop*, 604 F.2d at 98. By not requesting a jury instruction or objecting to the court's charge on damages, the trustee has waived any claim to prejudgment interest.

The trustee's final argument involves his motion to amend or alter judgment to include the Watts appellants in the verdict on Count III. His contention is that the verdict in their favor is inconsistent with the verdict against them on Count I and with the verdit against the others on Count III.

A motion to alter or amend judgment pursuant to Rule 59(e) may not be granted where to do so would undermine the jury's fact-finding role and trample on the defendant's seventh amendment right to a jury trial. *See Branson* v. *Prins Insurance, Inc.*, 79 F.R.D. 662, 664 (D.S.D. 1978); 11 C. Wright & A. Miller, Federal Practice and Procedure § 2817 at 111 (1973). If the relief sought here were granted, it would require a reexamination of the facts gound by the jury and a finding of liability where the jury had expressly found none.[10]

[10] We have found only one federal case in which a district court granted a Rule 59(e) motion which is in any way similar to our case. In *Mumma* v. *Reading Co.*, 247 F. Supp. 252 (E.D. Pa. 1965), a jury found the defendant liable for negligence and, finding the plaintiff contributorily negligent in the amount of 45%, reduced the verdict to that extent. Granting the motion to amend the judgment to restore the verdict to the full amount of damages found by the jury, the court declared that there was simply no evidence at all of contributory negligence by the plaintiff. The court briefly alluded to the question of whether granting the motion would call upon it to change the factual findings of the jury and concluded that it was merely striking from the judgment the erroneous portion "because it lacked both legal and

Moreover, a Rule 59(e) motion is addressed to the discretion of the district court. *Slater* v. *KFC Corp.*, 621 F.2d 932, 939 (8th Cir. 1980); *York Chrysler-Plymouth, Inc.* v. *Chrysler Credit Corp.*, 447 F.2d 786, 794 (5th Cir. 1971); *Florencio Roman* v. *Puerto Rico Maritime Shipping*, 454 F. Supp. 521, 526 (D.P.R. 1978).

We hold that there was no abuse of discretion in the denial by the district court of the trustee's motion to amend the judgment as to Count III.

We affirm the finding of liability on Count I as to Watts Detective Agency, Inc., Consolidated Services Corporation and Christopher P. Recklitis. We reverse the finding of liability on Count I as to Daniel C. Sullivan and Billy R. Otte. We affirm the finding of liability on Count III as to Daniel C. Sullivan and Billy R. Otte. The verdict of the jury on damages is affirmed.

Judgments accordingly.

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factual justification." *Id.* at 260. Although we do not think *Mumma* has much precedential value, it is distinguishable from the case before us. The jury there found the defendant liable. The amendment allowed by the court only changed this as to the percentage of liability.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 70-1336-N

DANIEL GLOSBAND, TRUSTEE IN BANKRUPTCY OF
D. C. SULLIVAN & CO., INC.,
PLAINTIFF,

v.

WATTS DETECTIVE AGENCY, INC., ET AL.,
DEFENDANTS.

ORDER AND MEMORANDUM OF DECISION
August 28, 1981

NELSON, D.J.

The trustee in Bankruptcy of D. C. Sullivan & Co., Inc. ("Sullivan Company") brought this action to recover the value of certain of the bankrupt's assets that were allegedly misappropriated. Named as defendants were Watts Detective Agency ("Watts"), the alleged recipient of the bankrupt's assets; Consolidated Service Corporation ("Consolidated"), Watts' parent corporation; Christopher P. Recklitis ("Recklitis"), the President of both Watts and Consolidated; and David C. Sullivan ("Sullivan") and Billy R. Otte ("Otte"), the bankrupt's President and Vice-President. The Trustee proceeded against these defendants under the following three theories of liability alleged in the complaint under separate counts. First, that not more than one year prior to Sullivan Company's bankruptcy, and while Sullivan Company was insolvent or so as to render it insolvent, they caused certain of its assets to be transferred to Watts for less than fair consideration, in violation of former 11 U.S.C. § 107(d)(2)(a).[1] Second,

[1] [sic]

that they caused such transfer to be made not more than one year prior to Sullivan Company's bankruptcy with the actual intent to hinder, delay, or defraud either existing or future creditors in violation of former 11 U.S.C. § 107(d)(2)(d). Third, that they unlawfully caused the bankrupt's assets to be diverted to Watts in violation of their fiduciary duty to Sullivan Company.

The evidence introduced in the case purported to show the following facts. Before the time of the alleged transfer of much of its property to the defendants, Sullivan Company had come upon financially hard times. Since 1968, it had owed the Internal Revenue Service unpaid payroll and withholding taxes amounting by April 1, 1970 to over $210,000. (Admitted fact 25; Exhibit 15). Further, it owed taxes to the Commonwealth of Massachusetts for the period 1961 to 1970 in the amount of $57,893. (Admitted fact 27). In 1969 and 1970, its disbursements continually exceeded sales by nearly 50%. (Admitted facts 19, 20, 22 and 23).

In May 1969, Recklitis and Otte engaged in preliminary discussions about a possible sale of Sullivan Company, but nothing resulted from the discussions. (Admitted fact 40).

In early 1970, Otte again discussed a possible sale of Sullivan Company with Recklitis. (Admitted fact 41). By that time Recklitis had become president of Watts as well as Consolidated. (Admitted fact 9).

In early April, Recklitis made an offer for the operating part of the Sullivan Company amounting to approximately $250,000. Sometime thereafter, Otte telephoned the customers of Sullivan Company to inform them that Sullivan Company was contemplating a sale of its business and to learn whether they would transfer their patronage to the purchaser. The customers apparently indicated that they would stay with the new company so long as service was uninterrupted.

Sullivan rejected Recklitis' offer of $250,000 as being too low. Subsequently, the IRS indicated that it would levy on

Sullivan Company's accounts receivable. On April 20, 1970, Sullivan Company had accounts receivable of $37,997,52. (Admitted fact 32). This money was needed principally to pay employee salesmen. At that time, Sullivan Company had a weekly payroll of $15,772.21 (Admitted fact 30) and a negative balance in its check book of $44,735.98. (Admitted fact 34). On April 22, 1970, Sullivan was in dire need of obtaining cash to meet that week's payroll as well as to cover the payroll checks sent out for the previous week. Apparently aware of Sullivan's worsening financial condition, Recklitis made a second, lower offer which was contingent on IRS' approval.

Negotiations between Watts, Sullivan Company and the IRS followed. At a meeting at 5:00 PM on April 22, 1970, the IRS rejected the last of the proposals made and stated to those present—Otte, Sullivan and Recklitis—that it would levy on Sullivan Company's accounts receivable the next day. After the meeting, Sullivan indicated that he was walking away from the business and that Otte should do whatever he had to do. Recklitis then offered Otte employment with Watts, and Otte accepted.

That evening and the next day, Otte began contacting the employees and customers of Sullivan in order to arrange for uninterrupted guard service. In this way, Watts, through Otte, sought to take over what were—according to the plaintiff trustee—the major assets of the Sullivan Company starting at 8:00 AM on the day the IRS was due to levy on Sullivan Company's accounts. On April 23, Watts began to service nine of Sullivan Company's former customers. (Admitted fact 55). Within a few days, Otte had secured for Watts thirteen of Sullivan Company's seventeen customers and enough of its employees to provide uninterrupted service for these clients. For at least one or two weeks following April 22, Watts supervised the servicing of Sullivan Company's former customers using the Sullivan Company's offices. That year, ending April 22, 1971, some $680,562 of Watts' gross sales were attributable to Sullivan Company's former customers. (Admitted fact 57).

The jury found all five defendants liable under Count I, and found defendants Sullivan and Otte alone liable under Count III; it further found that the bankrupt had sustained damages in the amount of $750,000. The verdict on Count II was in favor of the defendants. Pursuant to the jury's verdict, judgment was entered.

Currently pending before this court are various post-verdict motions urged on behalf of the several defendants. Defendants Watts, Consolidated and Recklitis, found liable only under Count I, have moved pursuant to F. R. Civ. P. 50(b) for judgment notwithstanding the verdict and in the alternative have moved pursuant to Rule 59(a) for a new trial, or a new trial on the issue of damages alone, or a remittitur. Defendants Otte and Sullivan, found liable under both Counts I and III, have also each moved for judgment notwithstanding the verdict and in the alternative for a new trial.

The motions for judgment notwithstanding the verdict shall be treated first, followed by the motions for new trial. Within each section the arguments of the various defendants shall be addressed *seriatim*.

I. Motions for Judgment Notwithstanding the Verdict

Defendants Watts, Consolidated and Recklitis advance three basic arguments in support of their motions for judgment notwithstanding the verdict. First, they argue that no "property" of the bankrupt, as that term is used in the Bankruptcy Act in connection with the definition of "transfer," old 11 U.S.C. § 1(30), passed from the bankrupt to any of the defendants. Second, they argue that there was no "transfer" within the meaning of the Bankruptcy Act because there was no proof that the bankrupt's estate was diminished. And, third, they argue that as a matter of law proof of the amount of damages was insufficient. Defendant Otte essentially adopts the arguments of Watts, Consolidated and Recklitis. Finally, defendant Sullivan adopts the arguments of the others but

argues in addition that there was insufficient evidence to hold him liable under Count III, and that the verdict against him (and Otte) on Count III is inconsistent with the verdict for defendants Watts, Consolidated and Recklitis on that count.

As an initial matter we must set forth the proper standard for ruling on a motion for judgment notwithstanding the verdict. That standard holds that the motion shall be granted only when, without weighing the credibility of any of the evidence, the only conclusion that can reasonably be drawn from the evidence, including all reasonable inferences, is a verdict and judgment in favor of the moving party. Moore's Fed. Pract. ¶ 50.07[2]; *see Rios* v. *Empresas Lineas Maritinas Argentinas*, 575 F.2d 986, 989-90 (1st Cir. 1978) (standard for appellate review of district court's denial of motion). Another attribute of the motion for judgment notwithstanding the verdict is that it has as a prerequisite a motion for a directed verdict. *Martinez Moll* v. *Levitt & Sons of Puerto Rico*, 583 F.2d 565, 568 (1st Cir. 1978); *see* F. R. Civ. P. 50(b) ("[A] party who has moved for a directed verdict may move to have the verdict and any judgment entered therein set aside and to have judgment entered in accordance with his motion for a directed verdict"). The purpose of this prerequisite "is to alert the opposing party to the movant's claim of insufficiency before the case goes to the jury, so that his opponent may have an opportunity to cure any deficiency in his case should the motion have merit." *Martinez Moll*, 583 F.2d at 569. As a corollary to the rule requiring a motion for a directed verdict as a prerequisite to a motion for judgment notwithstanding the verdict, any ground not raised in a motion for a directed verdict may not be raised in a later motion for judgment notwithstanding the verdict. *Sulmeyer* v. *Coca Cola Company*, 515 F.2d 835, 846 (5th Cir. 1975); *See* F. R. Civ. P. 50(a). Thus, the defendants' argument that the evidence was insufficient to prove the amount of damages fails, as it was not set forth at trial in any of the parties' motions for a directed

verdict. The closest that the defendants came to raising that was the statement in support of their motion for a directed verdict by defendant Watts, Consolidated and Recklitis: "[D]efendants assert that plaintiff has introduced no evidence that...any property asserted to have been...transferred decreased the value of the Sullivan Company's assets." That argument appears to duplicate defendants' second main argument, to be considered *infra*. But it hardly amounts to fair notice of an objection that there was insufficient evidence of damages in any reasonably certain amount. Furthermore, in light of the holding in Part II below that the amount of damages found by the jury was not against the clear weight of the evidence, it, *a fortiorari*, may not be disturbed by the granting of a motion for judgment notwithstanding the verdict that it was against the only reasonable conclusion that could be drawn from the evidence.[2]

Having thus disposed of the third of the arguments of defendants Watts, Consolidated and Recklitis, we may now turn to their first two arguments. The primary claim of these defendants, which is also urged by defendants Otte and Sullivan, is that there was insufficient or indeed no evidence that "property" of the Sullivan Company, as that term is intended in the Bankruptcy Act, passed from the bankrupt to any of the defendants. In order properly to evaluate this argument, it is necessary to arrive at an understanding of the meaning of the word "property" in this context.

All defendants were found liable under Count I of the complaint, which rested on old 11 U.S.C. § 107(d)(2)(a): "Every

[2] Holding the defendants barred from raising the issue of insufficiency of proof of damages due to their failure specifically to raise that issue on directed verdict is hardly unfair in this particular case, given the caution of this court on the record at the time of the motion for directed verdict that "I think that the parties have to be careful that they have complied with Rule 50-A insofar as it requires that the motion be accompanied by the grounds upon which a directed verdict is requested." Transcript, March 17, 1980, at 5-27.

transfer made. . . by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent (a) as to creditors existing at the time of such transfer. . . , if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent." A "transfer" is defined under old Title 11 as including "the sale and every other and different mode, direct or indirect, of disposing of or parting with property or with an interest therein or with the possession thereof. . . , absolutely or conditionally, voluntarily or involuntarily, . . . as a conveyance, sale, assignment, . . . gift, . . . or otherwise." Repealed 11 U.S.C. § 1(30). And "property" has been held to mean "something subject to ownership, transfer, or exclusive possession and enjoyment, which may be brought within the dominion and control of a court through some recognized process." *In re Portland Newspaper Publishing Co.*, 271 F. Supp. 395, 398 (D. Ore. 1967), *quoting Gleason* v. *Thaw*, 236 U.S. 558, 561 (1915). It has also been decided, perhaps a bit more broadly, as "anything of value—anything which has debt paying or debt securing power." *Pirie* v. *Chicago Title & Trust Co.*, 182 U.S. 438, 443 (1901). The difficulty of formulating a comprehensive yet meaningful definition of property was acknowledged by the Supreme Court in *Gleason:* "The accurate delimitation of the concept property would afford a theme especially apposite for amplificative philosophic disquisition." 236 U.S. at 560. The Court went on to observe that the Bankruptcy Act is a pragmatic statute and its terms ought ordinarily to be accorded the benefit of a pragmatic reading. *Id.* More recently the court has again emphasized the importance which must be ascribed to the purposes of the Bankruptcy Act in interpreting the terms, including "property," which it employs. *Segal* v. *Rochelle*, 382 U.S. 325, 379 (1966). The Court in that case dealt with § 70a(5) of the Bankruptcy Act, former 11 U.S.C.

§ 110(a)(5), which provided for the vesting in the trustee as of the date of the petition in bankruptcy of the title of the bankrupt to "property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered. . . ." It said, "[t]he main thrust of § 70a(5) is to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition. To this end the term 'property' has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed. [citations omitted]" *Id.* The Court in *Segal* also recognized a sometimes limiting purpose of the Bankruptcy Act, "to leave the bankrupt free after the date of his petition to accumulate new wealth in the future," *Id.*, but that purpose is not relevant to the matter now at issue.

Therefore, adopting the general *Segal* approach of looking to statutory purpose, it is this court's holding that the term "property," as invoked in the definition of a "transfer" in the context of former 11 U.S.C. § 107(d)(2)(a)'s proscription of fraudulent transfers, should be interpreted "most generously" to incorporate anything of value which but for the transfer might have been preserved for the trustee to the ultimate benefit of the bankrupt's creditors. It should be noted that under this approach the issue of whether or not something is property "is necessarily a federal question, since it arises under a federal statute intended to have uniform application throughout the United States." *McKenzie* v. *Irving Trust Co.*, 323 U.S. 365, 370 (1945) (meaning of "transfer" under the Bankruptcy Act). Of course the amount of protection to which some item of putative "property" is entitled under the law is generally a matter for state law—at least assuming state law is reasonable and not formulated simply so as to subvert the requirements of federal law, *Cf. DeSylva* v. *Ballentine*, 351 U.S.

that protection amounts to "property" under the Bankruptcy Act is, as just stated, an issue of federal law. That is, while state law will be permitted to determine the legal incidents of ownership or possession of a thing, the state law characterization of whether those incidents create a "property" right is not controlling so far as a federal court is concerned. With these general considerations in mind, therefore, it is necessary to turn more specifically to the issue of which, if any, of the things allegedly transferred in the case are considered "property" under the Bankruptcy Act.

Certain items are fairly easy to deal with. Ownership or possessory interests in office space would clearly constitute property, whether in the form of fee simple ownership, a tenancy for years, or even a tenancy at will. The court in *Lesser* v. *Mendelson*, 352 F. Supp. 321, 327 (S.D.N.Y. 1971) said, "Under the circumstances of the existing case, a month-to-month tenancy is a valuable right of the bankrupt, since a month-to-month tenant has every reason to believe that if he continues to pay his rent and if there is no great demand for the space by others, his month-to-month occupancy will continue without interruption for a substantial or indefinite period." This expectancy of continued occupation would appear to arise in even the barest tenancy at will or at sufferance, absent contravening indicia such as a stormy landlord-tenant relationship and the presence of other willing and financially able prospective tenants, and would constitute something of value which ought to be preserved to the trustee in bankruptcy. Similarly, ownership or leasehold interests in office furnishings and equipment would constitute "property" of the bankrupt. The evidence in the case at hand would have supported a jury finding that the possession of the Sullivan Company's office space and equipment was transferred, over a period of at least several days and perhaps as long as several weeks, to defendant Watts as of April 23, 1970. Since a "transfer" under old 11 U.S.C. § 1(30) includes the disposition

of or parting with "property or an interest therein *or with the possession thereof*" [emphasis added], and an interest in office space and equipment is "property," the jury would have been justified in finding a transfer of property at least to this extent.

Turning next to the issue of the employees of the Sullivan Company, the analysis is not dissimilar. Considered individually, it may be that employees are not "property." It is probably the case that the Sullivan Company could not have enjoined competing firms from hiring one of its at-will employees or enjoined such an employee from leaving, *See Barry* v. *Washburn-Garfield Co.*, 351 Mass. 797 (1970) (rescript opinion). The mere fact that state law refuses to enjoin the disturbance of a relationship does not, of course, mean that the continuance of that relationship is not a property right. The court in *Lesser*, for instance, considered as having value a month-to-month tenancy even though its termination would by definition not have been enjoinable. It is possible that the expectancy of a continued landlord-tenant relationship, is something of value which ought to be preserved for the benefit of the trustee. On the other hand, it may be that there is something unique about the freedom of individual employees to work where they choose so that even giving enough weight to the purposes of the Bankruptcy Act, *Segal*, *supra*, the expectation of the continuation of a single at-will employer-employee relationship may not be considered "property." But this issue need not be faced, as the jury in the instant case could clearly have found that not one but most of the Sullivan Company employees were transferred, in effect, to defendant Watts as of April 23, 1970. Certainly the aggregate of a business' employees, even if they be individually not property, is "property" within the meaning of the Bankruptcy Act. The jury could reasonably have found an expectancy that at least some of the employees would stay on for some indefinite period. There was testimony, for instance, that most of the Sullivan Company's guards had been with it for years. The

jury could also have found from the testimony that some effort had gone into the selection and training of those employees, and most particularly that some of the guards would have been highly sought after because of their security clearances and familiarity with the job requirements of the customers over whose premises they had watched. Taking all of this into consideration, therefore, the jury could reasonably have found that some value could have been realized by the bankrupt, or by its successor the trustee, for the aggregate list of the employees of the Sullivan Company. Thus the roster of Sullivan employees, if not those employees taken as individuals, could be found to constitute "property" within the meaning of the Bankruptcy Act.

Turning next to the customers of the Sullivan Company, much the same may be said, although here more conventional case law is of some assistance. Again, it is usually stated that an injunction will not lie for solicitation of individual customers of an enterprise by a competing enterprise where those customers are not under some contractual obligation to remain with the enterprise being "raided." *Cf. American Republic Ins. Co.* v. *Union Fidelity L. Ins. Co.*, 470 F.2d 820, 825 (9th Cir. 1972). Again, this proposition may be less than useful, or at least less than controlling, on the question of whether an individual business-customer relationship and its expectancy of continuation rise to the level of "property" within the present context. But there are cases which hold, even for purposes of enjoining competitors, that customers *lists* are property. Since the only test in the present context is whether a customer list is practically speaking something of value to the trustee, and there are no concerns about freedom of competition to be counterbalanced, evidence which amounts to a showing of protected "property" under so-called "customer list" cases would *a fortiori* rise to that level under the Bankruptcy Act.

The customer list cases deal generally with the issue of whether absent specific contractual provisions a former employer may be enjoined from soliciting customers from the roster of customers of his former employer. In most cases, customer list cases form a particular element of the general field of trade secret or confidential information law. "[A]lthough an employee may carry away and use general skill and knowledge acquired during the course of his employment, he may be enjoined from using or disclosing confidential information so acquired. [citations omitted]" *New England Overall Co.* v. *Woltmann*, 343 Mass. 69, 75 (1961). "An examination of the authorities leads to the conclusion that no general and invariable rule can be laid down where an employee, after leaving his employment, has made use of the information obtained by him through lists furnished by his employer, and that the question turns upon whether in a given case the list was confidential, and, if so, whether that fact should be submerged in the interests of free competition." *Wooley's Laundry, Inc.* v. *Silva*, 304 Mass. 383, 389 (1939). In some cases, customer lists, even if not confidential, may be protectable property under the customer list cases if they are reduced to writing, as opposed merely to existing in memory:

> The significance of the possession by an employee of a written list of his former employer's customers, as distinguished from the retention of their names in memory, in any particular case, where the information is not confidential, lies in the fact that the employer is the owner of the written paper, though partly or wholly prepared by the employee, in the fact that the list of customers was copied or written out in violation of a duty to the employee, or, perhaps, in the fact that the employer, in carrying off the written list, is carrying off something more than experience gained by him in the business.

DiAngeles v. *Scauzillo*, 287 Mass. 291, 297-98 (1934). The *DiAngeles* court seemed to treat the employer as the "owner of the written paper" if it was furnished by the employer, was a part of his system of accounts, was kept by the employee at the express or implied direction of the employer, or was essential to the business. *Id.* at 298. A list would be considered to be "copied or written out in violation of a duty to the employer" where it was written "in violation of any express or implied instruction of the [employer], surreptitiously, or for any disloyal purpose, such as preparing for further competition with him." *Id.* And a list might be "something more than experience gained by [the employee] in the business" where it "could [not] have been successfully carried in memory." *Id.* Finally, in determining whether a customer list or other business information, whether or not in written form, is confidential,

> the Restatatement of Torts, § 757, comment b, sets out six factors of relevant inquiry: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the employer to guard the secrecy of the information; (4) the value of the information to the employer and to his competitors; (5) the amount of effort or money expended by the employer in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Jet Spray Cooler, Inc. v. *Crampton*, 361 Mass. 835, 840 (1972). The *Jet Spray* court emphasized in particular the importance of the third factor, i.e., that the employer "not fail to take all proper and reasonable steps to keep it secret." *Id.* at 843. Often this would entail "periodic warnings and constant admonitions of secrecy." *Id.* at 844. But *Jet Spray* itself found a certain report confidential where only one copy was kept and it was given personally to one of the defendants to read, those facts constituting "sufficient and appropriate precautions to keep the report secret."

In the present case the jury could reasonably have found the existence of confidential or otherwise protected business information which was transferred to defendant Watts on or about April 23, 1970. The jury could have found that the list of customers of the bankrupt had been acquired over some period of time and with some effort,[3] and that such a list was of great value to the bankrupt and would be to potential competitors. The jury could have found the value of the list enhanced beyond that of an ordinary customer list because of the peculiar importance of continuity of service in the security guard business. The jury could have found that knowledge of the entire customer list was confined to defendant Otte and his assistant James Margotta—who together managed the daily operation of the company—even though individual guard employees were of course familiar with the identity of customers whom they personally served. The jury could have found that while it would be relatively easy for competitors to observe a particular business and to ascertain whether it was among the bankrupt's customers, some significant difficulty would have arisen in duplicating the bankrupt's entire customer list, as that would have involved surveying all businesses in the area which would potentially be in need of security guards and ascertaining whether or not their needs were being serviced by the bankrupt. Under this combination of findings, the customer list would qualify as confidential under the Restatement as cited in *Jet Spray*. In addition, the customer lists could reasonably be found to be protected even if not confidential as a list reduced to written form under the *DiAngeles* rationale. That is, the jury could reasonably have found the customer list to be on paper owned by the Sullivan Company in that the paper was provided by the bankrupt and was kept at its direction. The jury could have found that the actual paper containing the list was appropriated or used by

[3] There was testimony that most of the company's customers had been with it for several years.

defendants Watts and Otte and others for a period of at least several days and perhaps several weeks after April 23. Additionally, the jury could have found the list to have been appropriated in violation of defendant Otte's duty to his employer, as it was being employed to the benefit of a competitor—defendant Watts— at a time when the Sullivan Company had not voluntarily filed a petition in bankruptcy or indicated in any way that it was terminating its business operations. *See infra*.

Thus the jury could reasonably have found the customer list transferrd to defendant Watts on April 23 to have been "property" within the conventional definition of the customer list cases. As indicated earlier, this would seem *a fortiori* to make it "property" within the contemplation of the Bankruptcy Act, where the overriding policy involved is to preserve anything of real value to the trustee in bankruptcy. Under this broader definition of property, most customer lists would qualify as having at least some value. What the *Woolley's Laundry* court said about a list of laundry delivery customers appears equally applicable to a list of security guard customers:

> The value of a list depends in great measure upon the good opinion of the goods that the employer may sell or the work that he may do for his customers. It is undoubtedly true that a delivery route for certain commodities has a certain sales value. This is usually so because some one can be found who is willing to pay something for the opportunity of serving the customers in the hope that he may continue to hold their patronage.

304 Mass. at 390. Thus the jury could reasonably have found that there was some value, and indeed substantial value, to the Sullivan Company customer list, for much the same reasons that it could have found the list to be confidential. Furthermore, there was testimony that many customers had had continued good relations with the bankrupt, a factor that would enhance the value of the list. Under both the somewhat

restricted customer list cases and the broader compass of the definition of "property" fashioned earlier in this opinion, the jury could reasonably have found the Sullivan Company lists transferred to defendant Watts to have been property.

Under a similar analysis, other business information, all of it in written form, could have been found by the jury to amount to "property" under the Bankruptcy Act and to have been transferred to defendants. Thus there was testimony that schedules showing the times at which individual guards were to report to individual customers, the telephone numbers and addresses of guard and supervisory employees, as well as a detailed manual setting forth the needs and requirements of each of Sullivan Company's customers were also appropriated to the use of defendant Watts on April 23, 1970 for a period of at least several days or weeks. Such information could reasonably be found to be confidential and thus a trade secret, or at least in written form on paper owned by the bankrupt or appropriated in violation of a duty to it and thus qualifying as property by analogy to the written customer list cases. Furthermore, all of this information could quite reasonably be found something of value which the bankrupt or its successor the trustee could have sold. Under either approach, the information would qualify as Bankruptcy Act "property."

Finally, it remains to consider the least tangible alleged asset of the Sullivan Company which the trustee argues was "property" transferred to the defendants—goodwill. Goodwill at one time was thought of as "nothing more than the probability, that the old customers will resort to the old place." *Cruttwell* v. *Lye*, 17 Ves. 335, 346, *cited in Griffith* v. *Kirley*, 189 Mass. 522, 527 (1905). "[I]f it be assumed that a firm has been in existence for a time long enough to establish a business sufficiently permanent in character to include not only its customers but the incidents of locality and a distinctive name, these advantages constitute a going business enterprise; and it may then be said that the name and what is done under

it go together; and a good will exists which forms an asset of commercial value. . . ." *Moore* v. *Rawson*, 185 Mass. 264, 273 (1904). Beyond name and location, goodwill is now taken to mean "all that goes with a business in excess of its mere capital and physical value, such as reputation for promptness, fidelity, integrity, politeness, business sagacity and commercial skill in the conduct of its affairs, solicitude for the welfare of customers and other intangible elements which contribute to successful commercial adventure." *Martin* v. *Jablonski*, 253 Mass. 451, 457 (1925). Goodwill "is a right of property which the courts will guard as carefully as it would visible, tangible property." *George G. Fox Co.* v. *Glynn*, 191 Mass. 344, 349 (1906). Further, "[a] corporation may have a valuable good will even though the business may have been conducted at a loss during certain years, [citation omitted], and the existence of good will is not negatived by an omission to carry it upon the books at a certain valuation. [citation omitted]." *Commissioner of Corporations & Taxation* v. *Ford Motor Co.*, 308 Mass. 558, 571 (1941). As stated earlier, the state court characterization of goodwill as "property" is not binding under the Bankruptcy Act, but as goodwill is by definition *something of value* in a going concern which attaches by reason of its name, location, skill, reputation and the like clearly is "property" for the purposes of this opinion.

Analytically distinct from the concept of goodwill yet somewhat related is what has been termed "going concern value." "An additional element of value attaches to property, considered in the aggregate, by reason of its having been assembled for the conduct of a given business and its fitness for such use." *In re Nathanson Bros. Co.*, 64 F.2d 912, 913 (6th Cir. 1933). In other words, because the resources of an ongoing enterprise are used in conjunction with each other they may well have a collective value, as so used, in excess of the sum of the values of the individual resources taken separately.

Both goodwill and the *Nathanson Bros.* "going concern value" are going concern values in the sense that each arises initially only in conjunction with a going concern. When an enterprise ceases to be a going concern, goodwill evaporates, gradually if not instantly. Of course it may re-arise in the hands of a successor business, but that is dependent upon its performance, and would constitute the goodwill of *that* enterprise. So far as the original enterprise is concerned, and so far as the bankrupt in the instant case is concerned, the existence and value of goodwill depend upon the enterprise's status as a going concern.

"Going concern value," as that term was used in *Nathanson Bros.*, is somewhat different. Though it initially arises like goodwill, out of the arrangement of resources in a going concern, upon the death of that going concern the value would remain in the aggregate assets so long as those assets can be transferred together to a willing individual or entity which contemplates utilizing them together.

There are other differences between goodwill and "going concern value" as defined above. The latter concept has a kind of internal focus, as it is the added increment of value which attaches to a business by virtue of the way in which its individual assets and components are arranged and utilized in conjunction with each other. The concept of goodwill, on the other hand, has a more external focus, as it is derived from the attitude of customers and potential customers by virtue of the history of past performances by a company. These two notions are related, of course. Thus a business may be inefficiently arranged internally so as to reflect only a small *Nathanson Bros.* increment and this may result as well in poor performance so far as customers are concerned, giving rise as a result to a small goodwill value. And, as stated earlier, both concepts describe essentially intangible assets which are capable of existing only as part of a going concern. In any event, both types of intangible, as items of value from which the trustee and hence creditors could realize a benefit, are "property" under the Bankruptcy Act.

Before determining whether or not the jury could have found the existence of goodwill or "going concern value" in the case at bar, it is necessary to define what in law is cognizable as a "going concern."[4] A debtor should not be regarded as a going concern "if at the time of [the alleged transfer] he was financially dead or mortally wounded." *In re Fred D. Jones Co.*, 268 F. 818, 819 (7th Cir. 1920). In general, a business would no longer be a going concern where it is inoperative. For example, in *Langham, Langston & Burnett* v. *Blanchard*, 246 F.2d 529 (5th Cir. 1957), the court noted that the bankrupt, a mining company which had drilled wells but shortly thereafter had ceased all mining operations, could not properly be valued as a going concern. The same was found to be the case in *Trask* v. *Susskind*, 376 F.2d 17, 20 (5th Cir. 1967), which held that there is no attempt to transfer the goodwill of a going concern where the business has itself voluntarily declared bankruptcy and ceased doing business. *Id.* at 20.

Given these various definitions and principles, the jury reasonably could have found the existence of both goodwill and "going concern value" in the bankrupt. First, the jury could have found that as of the time of the alleged transfer the Sullivan Company was a going concern. There was no evidence that the Sullivan Company had declared bankruptcy and ceased doing business as had the bankrupt in *Trask*. The contention of the defendants is not that as of the end of the business day on April 22, 1970 the company was *actually* out of business; indeed, they admit that as of that day some seventeen customers were still being serviced. (Admitted Facts 17,

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[4] Strictly speaking, the continued existence of a going concern is not necessary to the existence of "going concern value" if, as noted above, there exist willing buyers for the aggregate resources of a firm. But as no evidence of the existence *vel non* of such buyers was introduced in this case, the existence of "going concern value" here, practically speaking, is dependent upon the bankrupt's still having been a going concern at the time of the transfer.

55). Rather, they contend that in the light of the financial conditions of the company and the impending levy of the IRS upon its accounts receivable the next morning, as of the end of that day the company was *constructively* no longer a going concern in that it would be unable to resume business the next day. In addition to the fact that the cases cited above seem to require an actual cessation of business to find a firm no longer a going concern, there was evidence that the Sullivan Company had been operating heavily in debt for some time, that the IRS levy would have affected only past due accounts and not future receivables, and that the company had on past occasions found last-minute finances to help it remain afloat. Thus, the jury could reasonably have inferred that the company could have continued in operation under its circumstances for some additional period of time, remaining at least temporarily unaffected by any threatened or actual IRS levy, and that it was therefore still a going concern.

Given the existence of a going concern, there was ample evidence to support a jury finding of the existence both of goodwill and "going concern value." For instance, there was evidence that many customers had been satisfied with the services provided by the bankrupt, and in particular as orchestrated by the defendant Otte; that the guards provided by the bankrupt were often peculiarly qualified for the service of particular customers because of their possession of FBI security clearances; and that there was a knowledge by the bankrupt of the needs of its customers, which knowledge was reflected in a detailed company manual and utilized in the assignment of guards to specific customers. There was evidence that many of the Sullivan Company's customers had been with it for years. In addition, there was evidence that prior to the alleged transfer the various customers had agreed that they would remain with the bankrupt if it were transferred so long as the new company retained the bankrupt's employees and guard services were continued uninterrupted. And there is evidence

that within two or three days after the transfer thirteen of the bankrupt's seventeen customers were being serviced by defendant Watts. From all of these facts the jury could reasonably have found both the degree of internal arrangement and juxtaposition of resources and external customer satisfaction which would amount to the existence of goodwill and the *Nathanson Bros.* increment of "going concern value."[5]

In conclusion, therefore, there was sufficient evidence in the record upon which the jury could find the existence of property of the Sullivan Company which was transferred to the defendant Watts.

The second ground asserted by the defendants Watts, Consolidated and Recklitis, and adopted as well by defendants Otte and Sullivan, in support of their motion for judgment, notwithstanding the verdict is that there was insufficient evidence of a diminution in value of the estate of the bankrupt

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[5] Defendants' motion for judgment notwithstanding the verdict attacks the sufficiency of the evidence to prove the existence of "property," including goodwill and "going concern value," in the hands of the bankrupt at the time of the alleged transfer, rather than the sufficiency of evidence of a "transfer." The latter issue would be somewhat interesting in the context of goodwill and "going concern value." It has been said that "[o]rdinarily, goodwill cannot be transferred separate and apart from tangible assets," that goodwill moves only where there is a "transfer . . . of the corporation[] as a going concern." *Trask* 376 F.2d at 20. Certainly, "when the *entire* assets of a business are sold, there is a presumption that good will passes." *United Tool & Industrial Supply Co* v. *Torrisi*, 356 Mass. 103, 106 (1969). But the test of whether goodwill has been transferred is not necessarily whether all or substantially all of a business' other assets have been transferred — although that would suffice under *United Tool* — but rather "whether the assets which are [transferred] are sufficient to enable the purchases to 'go on in real continuity with its past.' (Mutual Life Ins. Co. Menin, 2 Cir., 115 F.2d 975)." *Merry Hull & Co.* v. *Hi-Line Co.*, 243 F. Supp. 45, 51 (1965). This same analysis would seem to apply to "going concern value." With evidence supporting a finding of a transfer of the aggregate of employees and most customers, of guard schedules and manuals, and of at least temporary occupation and use of office space and equipment, the jury would be justified in finding a transfer as well of goodwill and "going concern value."

as a result of any transfer which the jury may have found to have taken place. It is not quite clear what contentions the defendants intend to raise by this ground. To the extent that their argument is simply that no "property" was transferred from the bankrupt's estate, that contention has already been considered. Defendants appear to be arguing, however, that even if "property" was transferred from the estate, it was not property of any value, as the Sullivan Company could not by virtue of its precarious economic condition have realized anything from the sale of that property. To some degree, the concept of property with no value may be internally contradictory in light of the definition of property as any thing of *value*, which thus ought to be preserved to the benefit of the bankruptcy trustee.

In any event, assuming that it is ontologically permissible to speak of entirely valueless property, it is clear that in this case the same evidence which permitted the jury to find the existence of property would permit it to find that property had some value. And, as to certain of the types of property which the evidence permitted the jury to find, such property has value as a matter of definition. That is, goodwill and the *Nathanson Bros.* "going concern value" represent the *values* that attach to a firm by virtue of customer satisfaction and internal coordination and arrangement of resources. For the jury to find such property to exist means of necessity that the bankrupt *could* have sold it, and thus realized some price in conjunction with a transfer of the operations of the business, all contrary to the defendants' contention. Finally, to the extent that the defendants argue under this ground that no property of the bankrupt of the type involved in this case could have had any value because the company was not at the time of the transfer a going concern, that contention has already been answered above. Thus the jury could reasonably have found the bankrupt's estate to have been diminished by virtue of the transfer which it found it to have occurred.

Finally, it remains to treat of the separate arguments of defendant Otte and Sullivan. Defendant Otte essentially only adopts the arguments of defendants Watts, Consolidated and Recklitis. As those defendants did not address themselves to liability under Count III, and as the other arguments of those defendants have already been dealt with, defendant Otte's liability under Count III can only be sustained.[6] Turning to the motion of defendant Sullivan, he too basically adopts the arguments of his co-defendants. The only new arguments he advances pertain to Count III, under which he argues both that the evidence was insufficient to connect him with the fraudulent transfer scheme of defendants Watts, Consolidated, Recklitis and Otte and that the verdict against him (and Otte) on Count III is inconsistent with the verdict on that count for defendants Watts, Consolidated and Recklitis. The second argument may be dismissed summarily. No authority is cited by Sullivan for the proposition that a verdict supported by sufficient evidence is to be overturned and a judgment for the moving party entered simply because the jury did not find against other defendants which found against him. Indeed, while verdict inconsistency is sometimes a ground for the awarding of a new trial, *see infra*, the sole issue on a motion for a judgment notwithstanding the verdict is the

[6] By adopting the arguments of co-defendants, Otte preserves those arguments only to the extent they were made. While defendants Watts, Consolidated and Recklitis argued that there was insufficient evidence of the existence of property or of a transfer of such which diminished the estate in value, *they* did not argue that even if there was sufficient evidence as to these two factors that that would not rise to the level of a breach of fiduciary duty under Count III, and thus *Otte himself* may not be heard to so argue. Given the nature of an officer's fiduciary duty to his corporation, *see infra*, the argument that participation in a fraudulent transfer under the Bankruptcy Act is not violative of that duty would be rather unlikely to prevail. In any event, since it is held above that there is sufficient evidence to sustain the jury's verdict against Otte under Count I, it is legally irrelevant whether there is also sufficient evidence to sustain its verdict against him under Count III.

sufficiency of the evidence and the law to support the verdict as it concerns the moving party only. *Garrison* v. *U.S.*, 62 F.2d 41, 42 (4th Cir. 1932); *see generally*, 9 C. Wright and A. Miller, Federal Practice and Procedure, § 2531 (1971). And as to the sufficiency of the evidence, the jury could reasonably have found that Sullivan breached his fiduciary duty to the bankrupt by participating in a transfer of the corporation's property without fair consideration at a time when the corporation was insolvent. The evidence showed that defendant Sullivan was President and a director of the bankrupt. "The directors of a commercial corporation stand in a relation of trust to the corporation and are bound to exercise the strictest good faith in respect to its property and business." *Goodwin* v. *Agassiz*, 283 Mass. 358, 361 (1933). They have "a duty of reasonably protecting and conserving its interests." *Lincoln Stores, Inc.* v. *Grant*, 309 Mass. 417, 421 (1941). The jury could reasonably have found Sullivan not to have lived up to his legal duty even though his failure to do so was not motivated by a desire for personal profit. This was not the usual case of double-dealing or other conflict of interest. Nonetheless, there was evidence that Sullivan had been a party to earlier attempts by defendants Watts and Consolidated through their President, defendant Recklitis, to purchase the bankrupt for valuable consideration, that those efforts had culminated in the April 22, 1970 meeting to which the IRS was a party, that the result of that meeting was that the Recklitis was unwilling to pay the $50,000 which he had previously offered to purchase the bankrupt. The jury could reasonably have found that Sullivan then abandoned his fiduciary duty toward the corporation and, in his own words, "handed over the business" to Recklitis. There was thus sufficient evidence to find Sullivan liable under Count III.[7]

[7] In any event, as it is held above that there is sufficient evidence to find against Sullivan under Count I, Count III is unnecessary to sustain the judgment against him.

In sum, as to all defendant and all relevant counts, there is sufficient evidence in the record from which the jury could reasonably find liability. The various motions for judgment notwithstanding the verdict are denied.

II. Motions For New Trial

Defendants Watts, Consolidated and Recklitis move for a new trial pursuant to F. R. Civ. P. 59(a) on several grounds: insufficiency of the evidence, improper admission of opinion evidence, improper instruction of the jury, improper conduct of opposing counsel, and excessiveness of the damage award. The three defendants seek, in the event that a full new trial is not ordered, a partial new trial on the issue of damages above, or a remittitur. Defendant Otte incorporates these arguments and adds in addition that the verdict on Count III was against the weight of the evidence and inconsistent with the verdicts on Count I and II. Defendant Sullivan also adopts the arguments of Watts, Consolidated and Recklitis and attacks the verdict on Count III as contrary to the evidence and court's instructions.

F. R. Civ. P. 59(a)(1) provides: "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trail by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States...." In *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 251 (1940), the Supreme Court in passing catalogued, though not exhaustively, some of the grounds upon which new trials may be granted: "The motion for a new trial may involve the discretion of the court insofar as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other means, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury."

Defendants Watts, Consolidated and Recklitis first argue for a new trial on the ground that verdict on Count I was against the weight of the evidence for the same reasons that they argued that they were entitled to a judgment notwithstanding the verdict on that count: i.e., that there was insufficient evidence of "property," that there was insufficient evidence of a diminution in value of the estate, and that there was insufficient evidence of damages. In the First Circuit, the standard for granting a new trial on the ground of insufficiency of the evidence is as follows:

> A trial court, in assessing whether to grant a new trial for lack of legally sufficient evidence, does not properly do so merely because it might have come to a result different from that reached by the jury. The district court should order a new trial only when convinced that a miscarriage of justice would otherwise obtain. Where credibility of witnesses is at issue, special care should be taken not to invade the province the jury.

Rios v. *Empresas Lineas Maritimas Argentinas*, 575 F.2d at 990. As to the defendants' first two arguments on the insufficiency of the evidence, the evidence has been set forth *supra* in consideration of the motion for judgment notwithstanding the verdict. It is clear from that discussion that the evidence supporting a finding of the existence of various types of "property" in the bankrupt and of a diminution in the bankrupt's estate was quite substantial.

Turning to a third contention of insufficiency of the evidence concerning damages, less summary treatment is in order. That issue was not discussed earlier on the motion for judgment notwithstanding the verdict because the defendants had waived it by failure to include it in their motion for a directed verdict. See p. 6, *supra*. But the making of a specific motion for a directed verdict is *not* a prerequisite for the pressing of a subsequent motion for a new trial, and the damages issue may thus be raised in the present context. This

argument of the defendants also appears to overlap with, if not to be indistinguishable from, the defendants' fifth argument on the motion for a new trial, namely, that the damages are excessive. These arguments shall be considered together.

In the First Circuit, damage awards even if "extremely high" are not to be overturned and a new trial granted where they are not "grossly excessive" or "shocking to the conscience." *LaForest* v. *Autoridad de las Fuentes Fluviales de Puerto Rico*, 536 F.2d 443, 447 (1st Cir. 1976). A "sort of irrationality" may have to appear. *Id.* In this case, the jury's damage award is not inconsistent with the evidence. Sullivan, himself, hardly a disinterested party, testified that in his opinion the business was worth one million dollars. Otte testified to the same effect. Beyond this, there was evidence that defendant Watts, in the year subsequent to the transfer from the bankrupt to it, had derived gross sales of some $680,000 from that portion of its business which was based on customers which had formerly been serviced by the Sullivan Company. It was for the jury to access the credibility and significance of this evidence. *Rios*, 575 F.2d at 990. Aside from the admissibility issues to be addressed momentarily, this court is satisfied that the jury verdict of a $750,000 award was not "grossly excessive," nor perhaps even "extremely high." This court cannot conclude that there was a patent miscarriage of justice.

Turning to the defendants' second argument, their contention is that Sullivan's opinion testimony as to the value of the Sullivan Company at the time of the alleged transfer was improperly admitted, and that Otte's opinion was dependent solely upon Sullivan's and thus equally improperly admitted. Defendants cite *Winthrop Products Corp.* v. *Elroth Co.*, 331 Mass. 83, 85 (1954) and *Maher* v. *Commonwealth*, 291 Mass. 343, 348-49 (1935) for the proposition that while the

owner of a business is usually competent to offer an opinion as to its value, he may not do so when his opinion is not based on personal knowledge or is based only on the opinion of others. They argue that at trial defendant Sullivan, the majority shareholder and President of the bankrupt, offered an opinion which was based solely on the opinions of others whom he had heard say that service businesses could be valued at the level of their gross sales. Thus Sullivan ventured the opinion that the Sullivan Company was worth approximately one million dollars. This error in the admission of evidence, argue the defendants, warrants the granting of a new trial.

This argument of the defendants fails in several respects. The cited *Winthrop Products* case holds that an owner of a corporation with knowledge of its property may testify as to the value of that property. Similarly, the *Maher* case recognizes that a landowner ordinarily may testify as to the value of his land because "commonly he is familiar with its characteristics and its availability for actual and potential valuable uses." 291 Mass. at 348. But when a landowner was testifying based "in substantial respects" upon the opinions of real estate experts and had had no opinion of his own prior to talking with such experts, and where he "also gave weight to the element of sentimental value," the testimony was held "based upon erroneous foundations" and improperly admitted. *Id.* at 348-49. In the present case, however, Sullivan's testimony demonstrated substantial familiarity with the operations of the business. While he did testify that he was basing his opinion in part upon the statements of others, no element of sentimental value was included within his valuation, and his personal familiarity with the business clearly was a substantial element. Sullivan's testimony thus might well be admissible under *Maher* and its weight a matter for the jury. In any event, in the federal courts the Federal Rules of Evidence are controlling on questions of admissibility, not state decisional law.

An owner's testimony as to the value of his own property could be admissible either as an opinion by a lay witness "based on ... personal perception" and "helpful to a clear understanding of his testimony or the determination of a fact in issue" under Rule 701, or as an expert opinion by one who is "qualified as an expert by knowledge ... [or] experience" under Rule 702. "[A]n owner, because of his ownership, is *presumed* to have *special knowledge* of the property and may testify as to its value." *United States* v. *Soward*, 370 F.2d 87, 92 (10th Cir. 1966) [emphasis supplied]. "The opinion testimony of a landowner on the valuation of his land has been admitted in federal courts without further qualification." *United States* v. *3,698.63 Acres of Land*, 416 F.2d 65, 67 (8th Cir. 1969) (citing *Sowards*). *Sowards* rejected an owner's opinion testimony because his testimony revealed him to be speculative and conjectural, thus rebutting the presumption of special knowledge which would otherwise attach. But in the instant case Sullivan's testimony revealed him to have adequate knowledge of his business to permit the admission of his opinion as to its value, leaving the issue of the weight to be accorded that testimony to the jury.[8] Otte's testimony was similarly admissible. No new trial is warranted by the evidentiary decisions taken by this court at trial.

Defendants Watts, Consolidated and Recklitis advance as a third ground for the granting of a new trial the argument that the court improperly instructed the jury as to the test for determining the value of any property of the bankrupt transferred to defendants and also that the value of any back wages owed by the bankrupt which were paid by defendant Watts was not to be treated by the jury as consideration for any transfer.

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[8] It should be noted that the jury apparently did not credit that testimony fully, as the damage award was significantly less than Sullivan's one million dollar value estimate. In arriving at its figure, the jury may well have taken into account the testimony that in the year following the transfer defendant Watts grossed some $680,000 from former customers of the bankrupt.

On the first issue defendants argue that an instruction on value based upon what a willing buyer would pay a willing seller was inappropriate inasmuch as a seller in the desperate financial position of the Sullivan Company could hardly be characterized as willing. But this ignores the testimony concerning prior negotiations between the bankrupt and defendant Recklitis regarding the possible sale of the company, from which a reasonable inference is permitted that the bankrupt would in fact have been a willing seller at the time of the transfer without consideration which the jury found to have taken place in this case. And the proper measure of damages is that amount of which the trustee, as representative of the bankrupt's creditors, was deprived by virtue of the transfer of assets at issue in this case. Certainly the trustee, seeking to maximize the return to those creditors, would have been in the position of a willing seller. Defendants, by their actions, deprived the trustee and this court, of the opportunity to ascertain precisely what amount could have been realized from the assets. As to the other claimed erroneous instruction, there was testimony that some time after Watts took on the employees of the bankrupt on or about April 23, 1970, it paid such employees back wages owed them by the Sullivan Company in an amount totalling $39,000. This court instructed the jury that any such payment was not to be taken into account in evaluating the adequacy of any consideration paid by the defendants for the transfer of Sullivan Company assets. As there was no evidence that any such payment was bargained for by the bankrupt as part of the transfer — or, indeed, that the bankrupt engaged in any bargaining whatsoever regarding this particular transfer — it was proper to instruct the jury to the effect that this was not consideration. In any event, where the jury reasonably found the value of the property transferred to defendants to be some $750,000, and where there was no evidence of any direct consideration paid by the defendants for the transferred property, any error involved in instructing the

jury not to consider the $39,000 if they found it to have been paid would be harmless under Fed. R. Civ. P. 61: "[N]o error or defect in any ruling or order or in anything done or omitted by the court . . . is ground for granting a new trial . . . unless refusal to take each such action appears to the court to be inconsistent with substantial justice." No problem of substantial justice appears when, under the relevant statute, consideration is "fair," "in good faith," "in exchange," and "a fair equivalent." Old 11 U.S.C. § 107(d)(1)(c). *See, e.g., Misty Management Corp.* v. *Lockwood*, 539 F.2d 1205, 1212 (9th Cir. 1976). Under such a definition, $39,000 could not be "fair consideration" for property found by the jury to be worth $750,000. No new trial is warranted on this ground.[9]

The final ground on which defendants Watts, Consolidated and Recklitis base their motion for a new trial is an argument that opposing counsel exceeded the limits of proper argument in his closing to the jury with the result that the jury verdict was ostensibly inflamed by passion and prejudice rather than based on reason. Counsel for the plaintiff made several references in his closing to the fact that defendant Recklitis had once been convicted of criminal fraud and argued that he was the mastermind of a scheme in this case to obtain the only valuable assets of the Sullivan Company for no consideration. Counsel asked rhetorically whether the jury would believe "a convicted fraud" and urged the jury not to fall for Recklitis' defense that nothing of value had been transferred to defendants". "That's his final con, to try and con you. Don't fall for it, please." The Federal Rules of Evidence specifically allow the use of prior convictions to impeach a witness under certain circumstances. F. R. E. 609(a). But those same rules in general prohibit the use of evidence of prior crimes to prove a propen-

[9] Defendants also appear to argue that they are entitled to a set-off of some $39,000 from the verdict as determined by the jury. But defendants did not claim such a set-off or counterclaim in their answer nor was such an issue effectively tried to the jury. *See* F. R. Civ. P. 15(b).

sity for committing similar acts or offenses from which it may be inferred that the act or offense at issue in the trial was in fact committed by a defendant. F. R. E. 404(b). The rationale behind this general rule is that the probative value of the evidence of the prior crime is outweighed by the "dangerous baggage of prejudice, distraction from the issues, time consumption, and hazard of surprise." Clearly, McCormack's Evidence, 2d ed., 1972, 445. Thus if an argument of counsel improperly attempts to focus the jury's attention on the character of a defendant so as to play upon prejudice and distract from the issues truly at hand, a new trial might be justified. But in this case, there is no evidence from the jury's verdict — which, as stated above, was quite within the bounds of the evidence — that it was the result of prejudice. Nor was the jury's verdict directed only at Recklitis, the defendant who was the object of the purportedly prejudicial remarks. And counsel's statements in any event were not egregious either in kind or in number. "While counsel's argument might have been in better taste, yet we are not convinced that it contained matter likely to mislead the jury or to prevent a fair verdict. In arguing to a jury, counsel must properly have some latitude so long as prejudice does not appear." *Schwartz* v. *Northwest Airlines, Inc.*, 275 F.2d 846 (2d Cir. 1960). Finally, it should be noted that at no time during the trial did defendant's counsel take exception to any remark made by opposing counsel, nor did he make any formal objection to any of the matters he now contends were so prejudicial as to justify the granting of a new trial. "If in fact defendant's counsel felt aggrieved by the alleged prejudicial comments and conduct, he should have called the matter to the court's attention so as to give the court an opportunity to take corrective action." *Faudree* v. *Iron City Sand & Gravel Co.*, 315 F.2d 647, 651-52 (3d Cir. 1963). Accordingly, a new trial is not warranted in this case on the ground of improper conduct of counsel or a verdict which is the product of passion, bias or prejudice.

Finally, it remains to deal with defendants Otte and Sullivan's additional arguments for granting a new trial on their behalf. Both defendants argue that the evidence was insufficient as to Count III. But the same evidence which was held sufficient earlier in the opinion to withstand a motion for judgment notwithstanding the verdict is also sufficient to satisfy this court that there was no miscarriage of justice as to Count III. There was ample evidence to support a finding of a breach by defendants Otte and Sullivan of their fidiciary duty to the corporation of which they were officers. Defendant Otte also argues that the verdict against him on Count III was inconsistent with the verdicts on Counts I and II. This court is at a loss to discern any inconsistency among the verdicts on the three counts as to defendant Otte. It is perfectly consistent to find that Otte participated in a transfer of assets during a time of insolvency (Count I) and in a breach of fiduciary duty (Count III) but did not possess an actual intent to defraud (Count II). And if defendant Otte is seeking to raise any inconsistency between his being found liable under Count III and defendants Watts, Consolidated and Recklitis being found not liable — as defendant Sullivan sought to do on his motion for judgment notwithstanding the verdict — no new trial is justified, as there was ample evidence to find against defendant Otte under Count III and he is not prejudiced by any failure or inconsistency on that count as regards other defendants.

As to defendant Sullivan, he argues that the verdict against him on Count II was "contrary to the instructions by the Court." But as no specific instances of inconsistency are raised, and as the verdict against Sullivan, as against Otte, seems perfectly proper under this Court's instructions, no new trial is in order.

In sum, all motions of all defendants for judgment notwithstanding the verdict or for full or partial new trials or for a remittitur are denied. The verdict and judgment as entered shall stand.

s/DAVID S. NELSON
DAVID S. NELSON
United States District Judge

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Judgment on Jury Verdict

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

CIVIL ACTION FILE NO. 70-1336-N

DANIEL GLOSBAND, TRUSTEE ON BANKRUPTCY
FOR THE D.C. SULLIVAN COMPANY

v.

WATTS DETECTIVE DETECTIVE AGENCY, INC.,
CONSOLIDATED SERVICE CORP.,
CHRISTOPHER P. RECKLITIS,
DANIEL SULLIVAN,
WILLIAM OTTE.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable David S. Nelson, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged

COUNT ONE: VERDICT FOR THE PLAINTIFF.

COUNT TWO: VERDICT FOR THE DEFENDANT.

COUNT THREE: DANIEL GLOSBAND *vs.* WATTS DETECTIVE AGENCY, INC.
VERDICT FOR THE DEFENDANT.

DANIEL GLOSBAND *vs.* CONSOLIDATED SERVICE CORP.
VERDICT FOR THE DEFENDANT.

DANIEL GLOSBAND vs. CHRISTOPHER RECKLITIS
VERDICT FOR THE DEFENDANT.

DANIEL GLOSBAND vs. DANIEL SULLIVAN
VERDICT FOR THE PLAINTIFF.

DANIEL GLOSBAND vs. WILLIAM OTTE
VERDICT FOR THE PLAINTIFF.

THE PLAINTIFF HAS SUSTAINED DAMAGES IN THE AMOUNT OF $750,000.00.

Dated at Boston, Massachusetts, this 20th day of March, 1980.

(s) FRANCIS B. DELLO RUSSO
FRANCIS B. DELLO RUSSO
Dpy. Clerk of Court

United States Court of Appeals
For the First Circuit

Nos. 81-1697
81-1698
81-1699
81-1700

ROBERT ROBINSON,
TRUSTEE IN BANKRUPTCY OF D.C. SULLIVAN & CO., INC.,
PLAINTIFF-APPELLEE,

v.

WATTS DETECTIVE AGENCY, INC., ET AL.,
DEFENDANTS-APPELLANTS.

DANIEL SULLIVAN,
DEFENDANT-APPELLANT.

BILLY R. OTTE,
DEFENDANT-APPELLANT.

Before
CAMPBELL, BOWNES AND BREYER, *Circuit Judges.*

ORDER OF COURT
Entered September 14, 1982

The petition for rehearing by defendant-appellant Billy R. Otte is denied for the same reasons as that of defendant-appellant Daniel Sullivan.

By the Court:
(s) DANA H. GALLUP
Clerk.

United States Court of Appeals
For the First Circuit

Nos. 81-1697
81-1698
81-1699
81-1700

ROBERT ROBINSON,
TRUSTEE IN BANKRUPTCY OF D.C. SULLIVAN & CO., INC.,
PLAINTIFF-APPELLEE,

v.

WATTS DETECTIVE AGENCY, INC., ET AL.,
DEFENDANTS-APPELLANTS.

DANIEL SULLIVAN,
DEFENDANT-APPELLANT.

BILLY R. OTTE,
DEFENDANT-APPELLANT.

Before
CAMPBELL, BOWNES AND BREYER, *Circuit Judges*.

ORDER OF COURT
Entered September 14, 1982

The petition for rehearing by Daniel Sullivan, defendant-appellant, is denied.

1. The district court properly assumed jurisdiction of the pendent state claim. The issue under Count I (fraudulent conveyance under the Bankruptcy Act) and the pendent state claim of Count III (breach of fiduciary duty) "derived from a

common nucleus of operative fact" and were so intertwined that "considerations of judicial economy, convenience and fairness to the litigants" required that they be tried together. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725-26 (1966). This is not the situation of *Rice* v. *Fellows of Harvard College*, 663 F.2d 336, 339 (1st Cir. 1981), where the federal claim was dismissed prior to trial and the court ruled on the pendent state claim. The facts as to whether Sullivan or Otte (defendant-appellant) received any of the fraudulently transferred property could not be determined until after trial. We note that before us neither Sullivan nor Otte raised the issue of receipt of the fraudulently transferred property. Slip op. at 14.

2. The second half of appellant's petition is merely a rehash and reargument of the conclusions and inferences to be drawn from the evidence.

By the Court:
(s) DANA H. GALLUP
Clerk.

United States Court of Appeals
For the First Circuit

Nos. 81-1697
81-1698
81-1699
81-1700

ROBERT ROBINSON,
TRUSTEE IN BANKRUPTCY OF D.C. SULLIVAN & CO., INC.,
PLAINTIFF-APPELLEE,

v.

WATTS DETECTIVE AGENCY, INC., ET AL.,
DEFENDANTS-APPELLANTS.

DANIEL SULLIVAN,
DEFENDANT-APPELLANT.

BILLY R. OTTE,
DEFENDANT-APPELLANT.

Before
CAMPBELL, BOWNES AND BREYER, *Circuit Judges.*

ORDER OF COURT
Entered September 14, 1982

The petition of the trustee-appellee for rehearing is denied.

We think the appellee's reliance on condemnation cases is inapposite. In such cases there has been a taking by the government and the main issue is the fair market value of the property (usually real estate) at the time of the taking. The fair market value is, in most condemnation cases, determined by

the finder of fact based on the testimony of independent expert witnesses. Here, there was no testimony by independent expert witnesses of the fair market value of the assets transferred to Watts. The principal evidence as to the value of the business came from Sullivan and his testimony, which we held was properly admitted, was as to the value of the business as a going concern, which was what Watts acquired. *See* slip op. at 9. While such evidence was sufficient to make the question of value one which the jury could decide, it does not compel the conclusion that the district court erred in ruling that the damages were not ascertainable before trial with reasonable certainty. *See* slip op. at 24.

The leading case on the question of prejudgment interest is *not*, as appellee asserts, *Jones* v. *United States*, 256 U.S. 40 (1922), which is a condemnation case, but, as we stated in our opinion at page 22, is *Roth* v. *Fabrikant Bros.*, 175 F.2d 665 (2d Cir. 1949), which involved a voidable preference and a fraudulent transfer under the Bankruptcy Act. Augustus Hand's ruling applies directly to the case at bar: "In our opinion, the recoveries allowed in the verdict for fraudulent transfers should not bear interest, for the amount of those claims were neither liquidated nor reasonably ascertainable by reference to established market values." *Id.* at 669.

By the Court:
(s) DANA H. GALLUP
Clerk.

[cc: Messrs. Freeley, Brown, Gailey and Featherston]

United States Court of Appeals
For the First Circuit

Nos. 81-1697
81-1698
81-1699
81-1700

ROBERT ROBINSON,
TRUSTEE IN BANKRUPTCY OF D.C. SULLIVAN & CO., INC.,
PLAINTIFF-APPELLEE,

v.

WATTS DETECTIVE AGENCY, INC., ET AL.,
DEFENDANTS-APPELLANTS.

DANIEL SULLIVAN,
DEFENDANT-APPELLANT.

BILLY R. OTTE,
DEFENDANT-APPELLANT.

Before
CAMPBELL, BOWNES AND BREYER, *Circuit Judges.*

ORDER OF COURT
Entered September 14, 1982

The petition for rehearing of defendant-appellant Christopher P. Recklitis is denied.

Recklitis claims that he, as with Sullivan and Otte, never received any of the fraudulently transferred property; that it was transferred to Watts Detective Agency, Inc. We cannot, however, ignore the relationship between Watts, Consoli-

dated Services Corporation and Recklitis. Watts, the initial recipient of the assets of the bankrupt, was owned by Consolidated which in turn was controlled by Recklitis; his trial testimony was that he was the sole stockholder of Consolidated. And it was Recklitis that initiated and consummated the entire transaction.

Under 11 U.S.C. § 110(e)(2), the trustee has the duty to recover the value of fraudulently transferred property from "whoever may *hold* or have received it." (emphasis added). As noted in *Elliott* v. *Glushon*, 390 F.2d 514, 516 (9th Cir. 1967), the purpose of the relevant sections of the Bankruptcy Act "is clearly to preserve the assets of the bankrupt." The trustee has a judgment against each of these three interlocked defendants for the value of the assets. For his purposes, it matters not which defendant satisfies the judgment. Because Recklitis owns Consolidated and through it controls Watts, he is the one to determine how the judgment is to be paid. *Jackson* v. *Star Sprinkler Corp. of Florida*, 575 F.2d 1223, 1235 (8th Cir. 1978). But he cannot escape personal liability if it develops that both Consolidated and Watts are now empty shells. Unlike the lawyer in *Glushon*, Recklitis was not a mere escrow holder or conduit through whom the assets passed. His corporate position made him the ultimate beneficiary of the fraudulent transfer. Under these circumstances, the corporate fictions must be disregarded. *Eisenrod* v. *Utley*, 211 F.2d 678, 681 (9th Cir. 1954). We do not think we erred in treating these three defendants as one. Slip op. at 2.

By the Court:
(s) DANA H. GALLUP
Clerk.

[cc: Messrs. Freeley, Brown, Gailey and Featherston]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 70-1336-M

DANIEL M. GLOSBAND, TRUSTEE IN BANKRUPTCY
OF D.C. SULLIVAN & COMPANY, INC.

v.

WATTS DETECTIVE AGENCY, INC.,
CONSOLIDATED SERVICE CORP.,
CHRISTOPHER P. RECKLITIS,
BILLY R. OTTE and
DANIEL C. SULLIVAN

PRE-TRIAL ORDER
Filed October 13, 1977

As the result of the pre-trial conference had, whereat the plaintiff was represented by Daniel F. Featherston, Jr., 7 Water Street, Boston, Massachusetts, and Benjamin Goldman, 6 Beacon Street, Boston, Massachusetts, and the defendants Watts Detective Agency, Inc., Consolidated Service Corp. and Christopher P. Recklitis by Evan Y. Semerjian and Timothy H. Gailey, Hale and Dorr, 28 State Street, Boston, Massachusetts, the defendant Billy R. Otte by Benjamin Brown, 6 Beacon Street, Boston, Massachusetts, and the defendant Daniel C. Sullivan by James F. Freeley, Jr., 183 State Street, Boston, Massachusetts, their attorneys of record, the following issues of fact and law were framed and exhibits identified:

JURISDICTION

(1) Jurisdiction is vested in this Court by virtue of plaintiff's claim that it has stated a cause of action under Section 67(d) and 67(e) of the Bankruptcy Act (11 U.S.C. §107) by

purportedly alleging a fraudulent conveyance of the property of the bankrupt plaintiff, and with respect to Count 3, by virtue of the Court's pendant jurisdiction, under 28 U.S.C. §1331.

ADMITTED FACTS

(2) The following facts are admitted by the parties:

Admitted Fact 1. The plaintiff is the trustee in bankruptcy of D.C. Sullivan & Company, Inc.

Admitted Fact 2. D.C. Sullivan & Company, Inc. (hereinafter called Sullivan Company) was a corporation organized under Massachusetts law with a usual place of business at 89 State Street, Boston, Massachusetts.

Admitted Fact 3. Sullivan Company was in the business of supplying security guards to business, industrial and other users.

Admitted Fact 4. A list of the holders of the capital stock of Sullivan Company is annexed hereto and marked "A".

Admitted Fact 5. The defendant Watts Detective Agency, Inc. (hereinafter called Watts) (to be agreed to by counsel prior to trial). In 1970 Watts had a usual place of business at 40 Court Street, Boston, Massachusetts.

Admitted Fact 6. Watts was and had been since prior to 1970 in the business of supplying security guards to businesses, industrial plants and similar facilities.

Admitted Fact 7. The defendant Consolidated Service Corporation (hereinafter called Consolidated) was a corporation organized under Massachusetts law with a usual place of business at 140 Brookline Avenue, Boston, Massachusetts.

Admitted Fact 8. Consolidated was and in 1970 had been for many years in the business of supplying janitorial and cleaning services.

Admitted Fact 9. During 1970 the defendant Christopher P. Recklitis (hereinafter called Recklitis) was the President of both Watts and Consolidated.

Admitted Fact 10. The defendant Billy R. Otte (hereinafter called Otte) was vice president and a director of Sullivan Company whose duties included general management of operations for the company.

Admitted Fact 11. The defendant Daniel C. Sullivan (hereinafter called Sullivan) was president and a director of Sullivan Company.

Admitted Fact 12. During 1970 Watts was a wholly-owned subsidiary of Consolidated.

Admitted Fact 13. In 1970 the president, treasurer, clerk and directors of Watts were the same persons as the president, treasurer, clerk and directors of Consolidated.

Admitted Fact 14. During its operation, Sullivan Company had a facility clearance from the United States government, and employed approximately 225 full-time or part-time guards, many of whom had security clearances.

Admitted Fact 15. From 1965 through 1969, the number of customers Sullivan Company serviced each year declined from 35 customers in 1965 to 26 customers in 1969.

Admitted Fact 16. At the beginning of April 1970 Sullivan Company had 17 customers.

Admitted Fact 17. A copy of Sullivan Company's ledger showing its sales for April 1970, listing its customers and the dollar amount of sales made to each, is attached hereto and marked "B".

Admitted Fact 18. Of the 17 customers Sullivan Company serviced in April 1970, four required guards with United States government security clearances: Honeywell, Inc., Epsco, Incorporated, High Voltage Engineering and Itek Corporation.

Admitted Fact 19. During calendar year 1969 Sullivan Company had sales of $1,060,854.46 and made disbursements of $1,518,694.30.

Admitted Fact 20. During the three months from January 1, 1970 through March 31, 1970, Sullivan Company had sales of $239,909.60 and made disbursements of $334,879.13.

Admitted Fact 21. Copies of Sullivan Company's ledgers showing said sales and disbursements by month from January 1969 through March 1970 are annexed hereto and marked "C".

Admitted Fact 22. In March 1970 Sullivan Company had sales of $94,195.34 and made disbursements of $121,844.00.

Admitted Fact 23. From April 1 through April 22, 1970 Sullivan Company had sales of $66,881.64 and made disbursements of $73,557.60.

Admitted Fact 24. Copies of Sullivan Company's ledgers showing sales and disbursements for March 1 through April 22, 1970 are attached hereto and marked "D".

Admitted Fact 25. From April 1969 through April 1970, the United States Internal Revenue Service ("IRS") filed notices of tax liens for back taxes owed by Sullivan Company in the total amount of $175,124.24 and in June and July, 1970, filed additional notices of tax liens in the total amount of $35,244.77. The kind and amount of taxes owed and the dates when notices of tax liens were filed are set out as follows:

Kind of Tax and Period Incurred	*Amount Due (Including interest and lien fees)*	*Dates notices were filed*
Withholding & FICA 3rd Qtr. 1968	$ 28,307.45	4/16/69, 4/17/69, 1/14/70
Withholding & FICA 4th Qtr. 1968	44,817.02	5/8/69, 10/9/69, 1/14/70
Withholding & FICA 1st Qtr. 1969	22,970.40	12/5/69, 1/14/70,
Withholding & FICA 2nd Qtr. 1969	9,366.53	1/20/70
Withholding & FICA 3rd Qtr. 1969	25,051.15	3/19/70
Withholding & FICA 4th Qtr. 1969	41,359.87	4/24/70, 4/27/70
Withholding & FICA 1st Qtr. 1970	24,641.56	6/26/70
Withholding & FICA 2nd Qtr. 1970	10,603.21	7/21/70
FUTA 1969	3,251.82	2/30/70
TOTAL	$210,369.01	

Admitted Fact 26. On November 5, 1970 the IRS filed on behalf of the United States government a proof of claim in bankruptcy against Sullivan Company claiming the above amounts were owed to the United States as unpaid taxes. A copy of that proof of claim together with two amendments thereto is attached hereto and marked "E".

Admitted Fact 27. As of April 22, 1970 Sullivan Company was indebted to the Commonwealth of Massachusetts for employee withholding taxes from 1969 to 1970 in the amount of approximately $57,893.

Admitted Fact 28. As of April 22, 1970 Sullivan Company was indebted to the Commonwealth of Massachusetts Division of Employment Security in the amount of $2,116.

Admitted Fact 29. As of April 22, 1970 Sullivan Company was also indebted to creditors other than governmental agencies in the amount of approximately $610,000, of which approximately $375,000 was secured by real estate.

Admitted Fact 30. During the week ending April 19, 1970, Sullivan Company had approximately 210 full- or part-time employees and had a weekly payroll of $15,772.21 per week, including $14,476.45 for field salaries and $1,295.76 for executive, officers and office staff payroll.

Admitted Fact 31. A copy of Sullivan Company's payroll analysis for April 1970 is attached hereto and marked "F".

Admitted Fact 32. As of April 20, 1970 Sullivan Company had accounts receivable in the amount of $37,997.52.

Admitted Fact 33. Sullivan Company's list of accounts receivable as of April 20, 1970 is attached hereto and marked "G".

Admitted Fact 34. As of April 22, 1970, Sullivan Company's checking account with the Capital Bank & Trust Company was overdrawn in the amount of $44,735.98.

Admitted Fact 35. A copy of the Statement of Account for the month of April, 1970 submitted by Capital Bank & Trust Co. to Sullivan Company is attached hereto and marked "H".

Admitted Fact 36. From April 2 through April 20, 1970, overdraft charges of $2,200.00 computed at a rate of $5 per check were made to the Sullivan Company account with the Capital Bank & Trust Co.

Admitted Fact 37. Copies of 12 notices of overdraft charge from the Capital Bank & Trust Co. to D.C. Sullivan Co., Inc. for the period April 2 through April 20, 1970 are attached hereto and marked "I-1" through "I-12".

Admitted Fact 38. From April 1 through April 21, 1970, checks in the total amount of over $14,500 were presented for payment against insufficient funds in the account of Sullivan Company with the Town Bank & Trust Co.

Admitted Fact 39. Copies of advice notices to Sullivan Company by the Town Bank & Trust Co. as to check presentments against insufficient funds are attached hereto and marked "J-1" through "J-11".

Admitted Fact 40. In approximately May, 1969, Mr. Benjamin Goldman, an attorney having a usual place of business at 6 Beacon Street, Boston, Massachusetts, telephoned Sullivan Company to inquire whether it might be interested in selling its guard business. He arranged for Otte to meet with Recklitis to discuss the possibility of such a sale to Consolidated, but these discussions were terminated shortly thereafter, with no results.

Admitted Fact 41. In early 1970 Mr. Goldman again arranged for a meeting between Otte and Recklitis for the purpose of discussing a possible purchase of Sullivan Company by Watts or Consolidated.

Admitted Fact 42. Otte also made telephone calls to every customer of Sullivan Company informing them that it was contemplating a sale of its business but that no sale had yet been arranged.

Admitted Fact 43. In March 1970, Sullivan Company issued seven payroll checks in the total of $299.88 which were not paid and were returned for insufficient funds.

Admitted Fact 44. On April 3, 1970, Sullivan Company issued 43 payroll checks in the total amount of $2,617.37 which were not paid and were returned for insufficient funds.

Admitted Fact 45. On April 10, 1970, Sullivan Company issued 63 payroll checks in the total amount of $3,406.86 which were not paid and were returned for insufficient funds.

Admitted Fact 46. On April 17, 1970, Sullivan Company issued 97 payroll checks in the total amount of $9,053.70 which were not paid and were returned for insufficient funds.

Admitted Fact 47. For at least a month prior to April 22, 1970, Sullivan Company was unable to pay its debts as they became due.

Admitted Fact 48. As of 5:00 P.M., April 22, 1970, Sullivan Company's payroll checks for that week, as well as for the previous week or earlier, would not be honored because no cash would be available to cover them.

Admitted Fact 49. On and after April 23, 1970, the IRS levied on all or most of Sullivan Company's account receivable.

Admitted Fact 50. A copy of one such notice of levy filed by the IRS on April 23, 1970 against any monies owed Sullivan Company by New England Telephone & Telegraph Co. is attached hereto and marked "K".

Admitted Fact 51. Of Sullivan Company's accounts receivable existing as of the close of business on April 22, 1970, Sullivan Company ultimately received only $1,779.13.

Admitted Fact 52. Watts also contacted the former Sullivan Company employees to offer to hire them. Watts agreed to pay the former Sullivan Company employees back wages which Sullivan Company had been unable to pay, or which were paid with checks which were not honored because of insufficient funds.

Admitted Fact 53. Wats paid approximately $39,000.00 to former employees of Sullivan Company for wages or salaries owed them by Sullivan Company for services rendered prior to

April 23, 1970. Watts paid nothing to any former Sullivan Company employees who did not become employees of Watts.

Admitted Fact 54. Prior to April 22, 1970, Watts was already aware of the names of Sullivan Company's customers.

Admitted Fact 55. On or about April 23, 1970, Watts began to service nine of Sullivan Company's former customers. On April 25, 1970, Watts began to service four more of the former Sullivan Company customers. Watts never serviced the remaining four former customers of Sullivan Company.

Admitted Fact 56. A list of the former Sullivan Company customers who were serviced by Watts after April 22, 1970 is attached hereto and marked "L".

Admitted Fact 57. In the year from April 23, 1970 to April 22, 1971, Watts received $680,562.00 in gross sales from providing guard services to the thirteen former Sullivan Company customers which Watts provided guard services to in that period.

Admitted Fact 58. Shortly after beginning to service the former Sullivan Company customers, Watts determined that it would not be able to service several of those customers at the prices which Watts had been charging them, and it raised the charges to those customers during the months of July, August and September, 1970.

Admitted Fact 59. The following is a list of those former customers of Sullivan Company whose prices per hour were raised by Watts in July, August and September, 1970:

Customer	Original rate per hour	Increased rate per hour	Month of change
Boston College	$2.50	$2.80	August, 1970
Epsco Corp.	2.70	3.15	September, 1970
Holy Cross	2.50	2.85	July, 1970
Liberty Mutual	2.75	3.27	September, 1970
Massachusetts State College at Worcester	2.45	3.05	August, 1970
New England Telephone	2.60	3.11	September, 1970
Sheriden Silver	2.45	2.90	August, 1970

Admitted Fact 60. The customers whose prices were not raised by Watts generally had been charged a rate of $2.80 per hour or more.

Admitted Fact 61. Of the thirteen former customers of Sullivan Company which Watts serviced after April 22, 1970, four terminated their use of Watts before the end of 1970, another terminated in March, 1971, and three more terminated in 1972, 1973 and 1974. A list of those customers and the dates on which they terminated their use of Watts is attached hereto and marked "M".

Admitted Fact 62. Watts neither billed nor received from the former Sullivan Company customers any payment for services rendered those customers by Sullivan Company.

Admitted Fact 63. On May 22, 1970, a petition in Bankruptcy against Sullivan Company was filed by certain creditors in the United States District Court for the District of Massachusetts, Bankruptcy No. 70-614. A copy of that petition is attached hereto and marked "O".

Admitted Fact 64. On May 22, 1970, Sullivan Company was adjudicated bankrupt.

Admitted Fact 65. On September 2, 1970, Benjamin Goldman filed a proof of claim in bankruptcy against Sullivan Company for the sum of $50,000 purportedly for broker's services rendered and commissions earned in 1970 from Sullivan Company. A copy of that proof of claim is attached hereto and marked "P".

Admitted Fact 66. On September 8, 1971, the plaintiff filed in the Sullivan Company bankruptcy proceeding in the United States District Court for the District of Massachusetts a Statement of Affairs for Sullivan Company, together with a Summary of Debts and Assets and Schedules A and B thereto. A copy of the Statement of Affairs, Summary of Debts and Assets and Schedules A and B are attached hereto and marked "Q".

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NO. 82-658

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CONSOLIDATED SERVICE CORPORATION,
WATTS DETECTIVE AGENCY
AND
CHRISTOPHER P. RECKLITIS,

PETITIONERS

V.

ROBERT ROBINSON, TRUSTEE IN BANKRUPTCY
OF D. C. SULLIVAN & CO., INC.,

RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Robert Robinson, Trustee in Bankruptcy of D. C. Sullivan & Co., Inc., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the First Circuit's opinion in this case. That opinion is reported at 685 F.2d 729.

SUPPLEMENTAL STATEMENT OF FACTS

From skeletal facts petitioners are wont to devise an image of themselves as a beneficient employment agency, in order to try and construct some issue warranting review. Some additional facts are mandated, so that the Court may see the petitioners as the corporate rapists they were, and properly assess that there was such a patent "fraudulent transfer" under the Bankruptcy Act that this case does not warrant intruding on the Court's burdened calendar.

The opinions of the courts below, set out in the Appendix to the petition, give an accurate, detailed picture of what occurred, but some "flavor" of petitioners' takeover of D. C. Sullivan & Co., Inc., will be here assayed summarily.

D. C. Sullivan & Co., Inc. was a rather

specialized security guard business--a strictly service enterprise, having little real property--a matrix of about 225 very loyal guards, supervisors, and office personnel, providing specialized security services particularly orchestrated for the needs of some 17 very loyal, highly reputable, and financially secure customers (A-3-A-4; A-8). Many of the customers were engaged in government defense work, like Itek and Honeywell, and most of the Sullivan guards had the security clearances necessary thereto (A-8; A-35-36). Specialized manuals were developed detailing the customers' particular needs, and continuity of security services provided was the sine qua non of the business (A-7-8; A-39-41). Billy R. Otte ("Otte") an ex-FBI agent with impecable credentials, was the day-to-day operating manager of the business, and the vital link to the

maintenance of both the customer and employee relations necessary to insure continuity (A-3-4; A-7-8; A-28; A-45-46).

In January, 1970, the petitioner, Recklitis, bought the petitioner, Watts Detective Agency, and made it a subsidiary of the petitioner, Consolidated Service Corporation, which parent corporation was wholly owned by Recklitis (A-4). Watts was also a Boston based security guard business, about the same size as the Sullivan Company, and the next month, February, 1970, Recklitis entered into negotiations to end up servicing the customers of the financially ailing Sullivan Company with its all-important specialized employees, and during those negotiations petitioners had full access to the Sullivan books (A-4-5; A-27-28; A-35). Recklitis was not merging Sullivan into Watts, was assuming none of the

Sullivan liabilities (which debt structure, excessive salaries and rents were causing net losses), nor even getting its accounts receivable--he was looking to buy the pure business opportunity of adding the Sullivan customers and special servicing employees to Watts' guard business (A-4-5; A-27-28; A-35). An important part of Recklitis' initial $200,000 plus purchase offer was to hire Otte to work for Watts, and Otte had contacted the Sullivan customers about the impending sale and had been assured that they would continue to be customers of the new owner, since Otte and the other Sullivan employees would continue to supply their specialized security needs without interruption (A-4; A-27).

The largest Sullivan creditor was IRS, and they finally determined to levy on the

Sullivan accounts receivable for taxes owed unless some satisfactory arrangements could be made, including a substantial immediate cash payment (A-4-5; A-27-28). Toward that end, a conference was had on April 23, 1970, between IRS, Sullivan and Otte, and Recklitis, the upshot of which was that the levies would not be made if Recklitis would pay IRS the $50,000 cash which was part of his then outstanding purchase offer, but Recklitis refused. Daniel C. Sullivan, the founder and president of Sullivan, just walked away numb, with the IRS levies to be made the next morning, and Recklitis, armed with the knowledge that, at least in Sullivan's and Otte's minds, they were out of business, proceeded to hire Otte on the spot and directed him to make the necessary phone calls and arrangements to insure the uninterrupted transfer of the Sullivan

customers and employees to Watts, and agreed to pay the $39,000 of "bounced" Sullivan salary checks of any employees who came to work for Watts, all to insure the vital continuity of service (A-5; A-12-14; A-27-28; A-55). Recklitis was well aware that he was then in a position to take for nothing the valuable business opportunity for which he had until then been willing to pay substantial money--that he "didn't just happen to be" "standing under the tree when the apples fell"--because he said to Otte: "it's a dirty way to do it, but these accounts are up for grabs", and he had "no qualms" about taking them (A-5). People called him a lot of things, Recklitis said, but "never have I been accused of being stupid" (Tr. 579).

Otte did the job for Recklitis; Watts managing to retain about three-quarters of

the Sullivan customers and provide them uninterrupted service, and in the next year Watts grossed about $680,000 from those Sullivan accounts (A-5; A-20; A-23). Starting the morning after the IRS conference and Recklitis' take over, the ex-Sullivan employees continued business as usual, operating out of the Sullivan offices and using the all-important Sullivan business records, customer manuals and information, for at least days and maybe weeks (A-28; A-37-41). The petitioners never paid the Sullivan Company or the trustee a dime for the valuable business they took, lock, stock and barrell (A-2).

In 1972, Recklitis sold all his Consolidated corporations to SCA, a very large national company, whose stock was and is traded on the New York Stock Exchange. He eventually became president of SCA, and a few months before the trial he pleaded guilty to three counts of a 12-count federal

criminal indictment, and was sentenced to two years, 18 months suspended, and a fine of $21,000, for "devising a scheme and artifice to defraud SCA" and for filing "false and misleading statements" with the SEC (A-18-19; A-56).

REASONS WHY THE WRIT SHOULD BE DENIED

1. Recklitis' Criminal Conviction Was Admissible.

Two of the three Questions Presented in the petition relate to the admission into evidence of Recklitis' criminal fraud conviction in the course of his testimony elicited by the trustee. The lower court had little difficulty holding that "there was no error in admitting this evidence" (A-18-19). The court found the basis for that ruling in the provisions of Federal Rules of Evidence 607 and 609 and Federal Rules of Civil Procedure 43 (b) (A-18-19). The latter reference was, of course, an oversight, as Rule 43(b) was

abrogated in 1975, and that erroneous reliance is the sole basis of petitioners' second question presented here. Had Recklitis brought the oversight to the lower court's attention in his petition for rehearing, which he did not, the court would no doubt have corrected the reference to the valid Rules citations fully justifying the admissibility of the conviction.

Petitioners make but one argument: that since Recklitis' conviction was put into evidence upon his being called as a witness by the trustee, there was a violation of Rule 609 of the Federal Rules of Evidence, providing that such a conviction may be "admitted if elicited...during cross-examination." The argument is, essentially, nothing but a semantic construct. By saying that the trustee was examining Recklitis "on direct

examination", because the trustee called him as a witness, petitioners say the conviction was not "elicitied...during cross-examination", but the simple answer is that Recklitis, as an opposing party, was on "cross-examination" by the trustee from the very first question. The court below accepted that assertion: "that because Recklitis was an opposing party, when he was called to testify he was being cross-examined in the first instance...." (A-18-19). The abrogated Rule 43(b) specifically provided that "an adverse party" could be called and the proponent "impeach him in all respects", and the Reporter's Notes to Rule 43(b) now assert that that "subdivision is no longer needed or appropriate since the matters with which it deals are treated in the Rules of Evidence." And so they are, as the Reporter's Notes continue: "...Who may

impeach is treated in Evidence Rule 607, and scope of cross-examination is covered in Evidence Rule 611(b)." No change of substance was worked or intended by the Rules of Evidence, and those were the appropriate citations supporting the holding of the court below. Rule 607 specifically authorized the trustee to attack the credibility of Recklitis, and Rule 611(b) authorized the admissibility of his criminal conviction. There simply was no error--no question even to present to this Court.

The lower court's affirmance of the admissibility of Recklitis' conviction is specifically concurred with in the only other case dealing with the question, United States v. Dixon, 547 F.2d 1079, 1082, n. 2 (9th Cir. 1976), quoted in the opinion below (A-19):

> "...Moreover, Rule 607, by its terms places no limitations on the manner in which a party may impeach his own witness, and there is no reason to believe that such a witness cannot be impeached by evidence of a prior convictions."

Not only do the petitioners, therefore, not present an error of any kind, they can point only to the concurrence of the only other Circuit to address the issue--not even an arguable conflict, nor any other "consideration" alluded to in Rule 17 of the Court for granting review on this point. Even to proffer it as a "cert-worthy question" is frivolous.

2. No Conflict In Circuits Exists Regarding The Fact That This Corporate Takeover Constituted A "Fraudulent Transfer" Under The Bankruptcy Act.

Petitioners'denominated arguments III and IV (ostensibly facets of their third question presented) color their

takeover of the Sullivan Company as an altruistic effort to reduce the unemployment rolls and continue servicing the customers otherwise bereft by the bankruptcy, maintaining that the lower court's holding that there was to that extent a "fraudulent transfer" conflicts with the Fifth Circuit case of Trask v. Susskind, 376 F.2d 17 (5th Cir. 1967). Both lower courts properly distinguished Trask because the bankrupt had ceased doing business before the employees were hired by petitioners' counterpart, while Sullivan Company was here warrantably found by the jury to still be a going concern (A-9; A-44). Actually, the facts of the Trask case distinguish it even more substantially, and remove any arguable conflict, which petitioners simply undertake to ignore. The Trask former employer had not only ceased doing business before only two of

its ex-employees solicited some former customers for a competitor, it had already declared bankruptcy. It's "value" was, therefore, incapable of being transferred. Also, unlike this case, the bankrupt had been in the wholesale grocery business, selling fungible products, not providing the very special particularized services which Sullivan sold; its two employees hired away were just salesmen, having no special business information of particularized value to any customer, and the grocery customers had no special needs. The two Trask employees were not all the hundreds of specially qualified employees taken from Sullivan. The two Trask employees also had no unique abilities--most particularly no ability to insure the continuity of customer servicing. To the extent that continuity of servicing was a consideration at all to the Trask

customers, they could have simply picked up the phone and had any of the bankrupt's competitors (who had solicited them before, which even Recklitis knew better than even to try to do) deliver the needed cases of lettuce, or whatever, which the bankrupt could no longer supply. Guards with the necessary security clearances, specially trained from manuals detailing the special security needs of the Sullivan customers, vitally dependent upon continuity of that special service, were not waiting in the Yellow Pages. The pivotal catalyst of an Otte was also not in the picture in Trask. The facts of Trask warrant the holding that nothing of value was transferred. The facts of this case demonstrate why this jury and both lower courts were absolutely correct in determining that everything of value Sullivan had was "fraudulently transferred" to petitioners. There is no

conflict between them because their facts are entirely different. Petitioners cloak themselves in whole cloth.

3. The Petitioners Took Property Belonging To The Bankrupt Which Had Value.

Petitioners' final argument V seems to be that there could not be any "fraudulent transfer" of the Sullivan Company employees, customers or "goodwill" because they did not constitute "property" under the Bankruptcy Act, as others could not be excluded from their use. Although they do not specifically argue why this supposed issue warrants review in this Court, the implication is that the lower court's holding to the contrary conflicts with a dictum of this Court in Kaiser-Aetna v. United States, 444 U.S. 164, 179-180 (1979). This argument has even less substance than the previous ones.

Kaiser-Aetna involved a question concerning the "navigable waters" of the United States, and has nothing whatsoever to do with what constitutes the estate of a bankrupt. The Court did note in passing that an element of "property", generally, is "that courts 'may compel others to forebear from interfering' " with it, but the petitioners fail to say that the Court then went on to add: "or to compensate for [its] invasion." Id. at 176. It is that latter legal relief for an "invasion" of property that is in issue in this case, not the alternative equitable remedy which petitioners seize upon.[1] Neither of the

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[1]There is also an instant relevance to another of the Court's observations: "...the fruition of a number of expectancies embodied in the concept of 'property',--exceptancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property." Id. at 117 (Emphasis supplied.)

lower courts deemed Kaiser-Aetna worthy even of citation, nor petitioners' "right to exclude" argument of sufficient substance to refute. Their perspicacity merits emulation here.

The Bankruptcy Act defined "property" in, then, 11 U.S.C. §(30), to include anything that results in a transferee ending up with something of value of the bankrupt's, whatever it was and however it was transferred. That is bedrock law. This Court made that very clear long ago in the leading case of Pirie v. Chicago Title & Trust Co., 182 U.S. 438 (1901), at 444:

> "...All technicality and narrowness of meaning is precluded. The word ['transfer'] is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished."

Petitioners grossed $680,000 in the year following the takover just from the Sullivan

accounts they were able to retain. That is eloquent proof that they got something of substantial value. Wily Recklitis--"never...accused of being stupid" (a fraud, yes, but stupid, no)--knew a valuable business opportunity when he saw one, and he knew the only way he could get the Sullivan operation (before the opportunity to take it arose) was to buy it. That is what he negotiated to do, and what he sought to buy he eventually took for nothing. Ten years late--twelve and a half years now--the jury simply said it was time to pay for it.

To cloud the realities, petitioners have constantly tried to atomize the very real business opportuinty they took (no one owns their employees, there were no written contracts with the customers, there was no goodwill, etc.). The lengthy, studious,

and detalied district court opinion (A-26-59) accepted petitioners' efforts to fragment the whole, and disposed of each element, demonstrating that the evidence warranted the jury's verdict that there was a "fraudulent transfer." The court below better grasped the realities (A-8):

> "The [district] court engaged in a lengthy in-depth analysis of the transfers of the guards, customers and goodwill and held that they were each susceptible of having value and, therefore, of being 'property' in a bankruptcy setting. We agree. We add, however, that what was transferred to Watts amounted in the aggregate to a transfer of the business itself. The whole was greater than its parts."

It should be clear to the Court that the subject petition is totally unmeritorious.

C O N C L U S I O N

For these reasons, the petition for a writ of certiorari should be denied, and "appropriate damages" assessed.

Respectfully submitted,

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